No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

ANTHONY JOHNSON,

Petitioner,

v.

JOHN McCULLAH; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "actual innocence" exception to procedurally barred habeas corpus petitions recognized by this Court prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 apply to first habeas corpus petitions which are barred by the one year limitation period in 28 U.S.C § 2244(d)(1)?

2. Does application of the "actual innocence" exception to habeas corpus petitions which are barred by the one year limitation period in 28 U.S.C § 2244(d)(1)require the petitioner to demonstrate that he exercised "due diligence" in bringing his first habeas petition based on newly discovered evidence of "actual innocence"?

3. Did the lower court commit and error of law by applying a more stringent standard than that set forth by this Court in Schlup for determining whether Petitioners newly discovered evidence was sufficient to establish an "actual innocence" claim?

4. Did the lower court deny Petitioner due process of law in violation of the Fourteenth Amendment of the United States Constitution by denying him a hearing on his claims of "actual innocence"?

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OPINIONS BELOW

On March 5, 2004, the Third Circuit Court of Appeals issued an Order denying Petitioner's Application for Certificate of Appealability as time barred on the basis that Petitioner had not met his burden under *Schlup v Delo*, 513 U.S. 298 (1995). There was no separate Opinion issued.

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit entered its Order denying Petitioner's Application for Certificate of Appealability. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment of the United States Constitution, which provides in pertinent part that no state shall "deprive any person of life, liberty, or property without due process of law" as well as the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of

Counsel for his defence." U.S. Const. Amend. VI and XIV. In addition, this case involves the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C § 2244(d)(1), which provides that " A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1).

STATEMENT OF THE CASE

On December 8, 1986 Barry Smith was robbed and murdered outside of the Elbow Bend Bar in West Philadelphia. Petitioner was tried for the crimes by a jury in the Court of Common Pleas for Philadelphia County, along with two co-defendants, Gerald James and Curtis Manning.

The Commonwealth's key witness, Harrington Fassett testified that he was at the Elbow Bend Bar talking to Barry Smith. He testified that he observed Smith speaking with two (2) unidentified men. (N.T. 5/11/88 pp 24-25). Shortly thereafter, Petitioner and two friends, Curtis Manning and Gerald James, arrived at the bar and began talking to Smith. The men walked to the back of the bar and continued to talk while James made a telephone call. Manning, James and the Petitioner then walked outside. Smith left the Bar a few moments later. (N.T. 5/11/88 pp. 27).

According to Fassett a gunshot was then heard, and Fassett went outside to find Smith slumped down on the ground bleeding (N.T. 5/11/88, 24-28). He did not see *anyone* outside except Smith who had been shot. (N.T. 5/11/88, pp 28). Fassett specifically testified that

when he went outside he ***did not*** see Manning, James or Petitioner out there. (N.T. 5/11/88, pp 28). The Commonwealth presented *no* witnesses at trial who actually saw Smith being shot and killed.

Commonwealth witness, Annette Lloyd testified that Petitioner and his co-defendants went to her house after leaving the Bar, where they proceeded to divide up some money. (N.T. 5/13/88, pp. 26-27). Lloyd also testified that Petitioner and his co-defendants discussed whether Smith had died. (N.T. 5/13/88, pp. 26-27). Commonwealth witnesses further testified that a search warrant of co-defendant's girlfriend, Tasha Clark's house was subsequently executed by police and a revolver was found. (N.T. 5/19/88, pp. 56, 67).

Smith died of a single gunshot wound of the left temple area fired at close range. A .38 caliber projectile which was broken into two (2) pieces was recovered from the deceased (N.T. 5/23/88, 24-25). The recovered projectiles did not match the revolver found at Clark's house. (N.T. 5/19/88, pp. 56, 67; 5/23/88 pp. 32-33, 37)

Petitioner's defense was that the two (2) unidentified men who had spoken with Smith in the Bar, (rather than he, James, and Manning), committed the shooting. This defense was supported by numerous credible witnesses.

At trial, Diana Sapp testified that she saw both Manning and James inside the bar with a third person (Petitioner) at the time the gunshot went off outside (N.T. 5/25/88, pg.40-43). Darrell Malone testified that he was driving up to the bar when he saw two (2) men

grab Smith and then heard a shot. He recognized one (1) of the assailants as a person named "Kevin" (N.T. 5/24/88, pg. 4-10). Malone testified that none of the assailants were the Petitioner or his co-defendants. (N.T. 5/24/88, p. 3). Ralph Cathell testified that he recognized the two (2) men talking to Smith as "Rob" and "Tuck" (N.T. 5/26/88, pg. 4-5). When Cathell went outside after hearing the gunshot, he observed Rob and Tuck going through Smith's pockets (N.T. 5/26/88, pg. 6-7).

On June 3, 1988 the jury returned guilty verdicts on all three defendants. Petitioner was found guilty of Second-Degree Murder, Robbery and Criminal Conspiracy. Petitioner timely filed Post Trial motions, which were denied on April 24, 1989. Petitioner was sentenced to life imprisonment on the Second Degree Murder conviction, running consecutively with 5 to 10 years on the criminal conspiracy conviction.

Petitioner timely filed his Notice of Appeal with the Pennsylvania Superior Court on May 16, 1989. On September 13, 1990 the Judgment of Sentence was affirmed. Petitioner timely filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on May 15, 1990. The Petition was denied on April 26, 1991.

Petitioner filed his first Post Conviction Relief Act Petition on February 20, 1992. An Amended PCRA Petition was filed on November 29, 1993. Another Amended PCRA Petition was filed on June 20, 1994. By Order dated December 7, 1994, Petitioners PCRA Petition was denied.

Petitioner timely filed a Notice of Appeal with the Pennsylvania Superior Court on December 28, 1994. On June 27, 1995, the lower court Order denying the PCRA Petition was affirmed.

Petitioner filed a second PCRA Petition on January 10, 1997. On July 14, 1997 Petitioner filed an amended pro se Petition. [1] On July 16, 1997, without considering the amended petition, the Court denied Petitioner relief.

Petitioner requested Reconsideration of the dismissal on August 1, 1997 on the basis that the Court had not ruled on the Amended Petition, but rather only on the initial petition. On January 14, 1999 Petitioner filed a Motion for Leave to File Appeal Nunc Pro Tunc with the Pennsylvania Superior Court.

On January 28, 1999 Petitioner filed his third PCRA Petition (Motion and Amended Petition), which reasserted the claims presented in the Amended PCRA petition filed on July 14, 1997, referenced above. On February 26, 1999 Petitioner filed a pro se (amended) Petition. Two additional counseled amended Petitions were filed on December 21, 1999 and January 7, 2000.

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[1] The Amended Petition alleged 1) ineffectiveness of counsel in failing to investigate and call potential witnesses Carvello, Freeman, Bey, Mathis, and Key; 2) ineffective failure to properly cross-examine Clark and Fassett; 3) ineffectiveness related to failing to move for suppression of illegally seized evidence; and 4) ineffective failure of trial counsel to object to the Commonwealth's improper impeachment of defense witness, Cathell related to his 'open' arrests.

On July 10, 2000 Petitioner was sent a letter from the chambers of the Honorable James Fitzerald, presiding judge, advising that the above Petition was listed for court action, however, the letter failed to include the mandatory Notice pursuant to Pa.R.Crim.P. 1507. On August 25, 2000 the Petition was dismissed without additional argument.

On October 15, 2001 the Pennsylvania Superior Court affirmed the lower court dismissal of the PCRA petition.

Petitioner filed a Habeas Corpus Petition in the U.S. District Court for the Eastern District of Pennsylvania on March 19, 2002 alleging the existence of new evidence of actual innocence. The habeas petition was Petitioner's first. A47-77.

U.S. District Court Magistrate Judge Diane Welsh issued a Report and Recommendation dated July 19, 2002 suggesting dismissal of the petition on the basis that Petitioner had not diligently pursued his claims. A26. On August 14, 2002, the Honorable Edmund Ludwig issued an Order referring the matter back to Magistrate Welsh for a finding on whether Petitioner had sufficient new evidence to establish that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. A24.

Petitioner submitted affidavits from various witnesses in support of Petitioner's claim of actual innocence. A65-77.

Tasha Clark testified at the trial. Clark provided an affidavit approximately 6 months after the trial. In that affidavit, she stated that two Detectives coerced her into signing an untrue and unread statement by threatening to have her arrested and charged as an accomplice to murder. Approximately 3 weeks before the trial she received a subpoena to appear at the District Attorney's Office, but knowing that she had lied in her police statement, she didn't go. A week later one of the Detectives and several other officers came to her house, took her into custody against her will and transported her to the District Attorney's Office. She was told by the Detectives that if she didn't testify consistently with the police statement that criminal charges would be filed against her. The prosecutor told her to just follow his directions and everything would be all right.

On the day she was supposed to testify, Clark didn't appear. One of the Detectives called her house and told her that she had two hours to appear or the judge would throw her in jail for murder. When she arrived, the prosecutor again told her that if she didn't testify consistently with the false police statement that he would charge her with conspiracy to murder. This threat was made all the more real by her seeing another witness, Angie Lee, led from the courtroom by these detectives in handcuffs. Clark also stated in her affidavit that she was under the influence and intoxicated by codeine during the trial. A65-66.

Due to the ineffectiveness of counsel, John Carvahlo didn't testify at the trial. Carvahlo's affidavit stated that outside the Bar, he saw Smith on the ground

and two guys going through Smith's pockets. He saw the Petitioner and co-defendant James sitting in a car across the street. Carvahlo also saw an unknown male standing across the street from the two men robbing Smith. Not wanting to get involved, Carvahlo immediately left the scene without speaking with police and later when asked by police, denied having been present. A67-68.

Nor did Mark Freeman testify at trial. Freeman's testimony was particularly exculpatory in that he was an eyewitness to McKellop's shooting of Smith. Freeman would have testified that he was walking along Master Street when he saw Smith, whom he knew, being held by the collar by Stephan McKellop. McKellop had a gun pointed at Smith's head. An unknown man was going through Smith's pockets. Freeman witnessed McKellop shoot Smith in the head and an unknown man go through Smith's pockets. Freeman testified that McKellop and the unknown male then jumped into a car driven by a third male and drove off. Freeman knew the Petitioner, and his co-defendants, Manning and James, by sight, and did not see them participate or any way involved in the crime. Furthermore, Freeman, who also knows Carvahlo, saw him coming out the door of the bar. A74.

Andre Key a/k/a Shawn Nelson, who also did not testify at trial, would have been a critical exculpatory witness. Key stated in his affidavit that he, "Smoke", Khadir, and McKellop had gone to the Bar to

buy some drugs. A70[2]. They all knew Smith, who sold drugs. "Smoke" stayed behind to park the car while Key, Khadir, and McKellop entered the Bar. Smith was playing pinball. Key, Khadir, McKellop, and Smith left the Bar. "Smoke", who had been parking the car approached. McKellop and Smith began arguing and McKellop reached into Smith's pockets. Smith pushed McKellop, who pulled a gun and shot Smith in the head. Neither Key nor Khadir had any idea that McKellop was going to rob and/or shoot Smith, and they turned and fled. A70.

Abdel Bey, the D.J. and bartender at the Bar, gave police a statement on December 9, 1986 and a statement to a private investigator on March 31, 1997. Bey knew Smith and saw him enter the Bar with two or three men, none of whom were the Petitioner or his co-defendants. Bey went to the bathroom shortly thereafter, and on his way, he passed Smith and the two men he came in with at the pinball machine. When Bey exited the bathroom a few minutes later Smith and the men were not in the bar. A76. Bey returned to the bar and began cleaning a glass when he heard someone say that someone had been shot outside. A few people, including Karen Mathis, ran outside. Bey stayed inside the Bar.

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[2] Key's testimony is all the more credible and critical in that he is able to corroborate the identity of the actual perpetrators, which other witnesses previously testified to. For example, Key's testimony corroborates Freeman's concerning Stephen being Stephen McKellop (See *Commonwealth v. Manning*, N.T. 3/23/98, pp. 11). Key's testimony also corroborates the testimony of Malone that Kevin is Kevin Taylor a/k/a Khadir. (See *Commonwealth v. Manning*, N.T. 5/24/4 pp.10)

Karen Mathis, a barmaid at the Bar the night of the murder, provided an affidavit attesting to her having seen three men, none of whom were tall enough to be one of Petitioner's co-defendants, come up to Smith and then leave the Bar with him prior to shots being heard. A72-73.

By Order and Opinion dated March 17, 2003, Magistrate Welsh denied Petitioner's request for a hearing and issued a Supplemental Report and Recommendation finding that Petitioner had not met the burden of proof under *Schlup v. Delo*, 513 U.S. 298 (1995). A8. Petitioner timely filed Objections to the Supplemental Report and Recommendation. On July 22, 2003 the Honorable Edmund Ludwig adopted the Supplemental Report and Recommendation and dismissed Petitioner's habeas petition as time barred.

Petitioner thereupon timely filed an Application for Certificate of Appealability with the Court of Appeals for the Third Circuit. By Order dated March 5, 2004, Petitioner' Application was denied on the basis that Petitioner had not met his burden under *Schlup Id.*

Petitioner is currently confined under inmate number AS3197 at the State Correctional Institution at Houtzdale.

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 10 of the Supreme Court Rules, a Petition for a Writ of Certiorari may be granted where there is a split in the United States Circuit Courts of Appeal on an important issue of law, or a

United States Circuit Court of Appeal has decided an important issue of federal law "that has not been, but should be, settled by this Court". SUP. CT. R. 10(A), (C). This petition satisfies both of the above requirements.

Section 2244(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") imposes a one year statute of limitations bar on an initial Petition for a Writ of Habeas Corpus. 28 U.S.C § 2244(d)(1). In this case, the Court of Appeals for the Third Circuit denied the Petitioner's Application for a Certificate of Appealability (hereinafter "ACOA") under 28 U.S.C. § 2253 because his application for a Writ of Habeas Corpus failed to comply with the one year limitation period provided for in § 2244(d)(1). A2. Rejecting Petitioner's claim that the one year limitations period was tolled because the Petitioner had introduced newly discovered evidence establishing "actual innocence", the Third Circuit held that "[a]ssuming *arguendo* that there exists an actual-innocence exception to the habeas statute of limitations, jurists of reason could not debate that the District Court properly rejected Appellant's new evidence as insufficient under the standards of *Schlup v. Delo*, 513 U.S. 298 (1995)." A2. The Third Circuit's rather equivocal approach to the issue of whether there is an "actual innocence" exception to the one-year statute of limitation in § 2244(d)(1) illustrates the difficulty the lower courts have had in addressing the issue. *See generally*, Sussman, "Unlimited Innocence: Recognizing an 'Actual Innocence' Exception to AEDPA'S Statute of Limitations", 27 N.Y.U Rev. L. & Soc. Change 343, 347-48 (2002)("Whether a claim of

'actual innocence' constitutes an exception under AEDPA's statute of limitations presents a question of considerable debate that few courts have addressed directly and that, as of this writing, no court has affirmatively resolved in favor of a petitioner").

Like the instant case, a number of courts have declined to address the issue of whether there is an "actual innocence" exception to the one-year statute of limitation in § 2244(d)(1) by holding instead that the evidence of "actual innocence" was insufficient[3]. *See Delaney v. Matesanz*, 264 F.3d 7, 8 n. 2 (1st Cir. 2001); *Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1218 n. 6 (11th Cir. 2000). While a number of courts have circumvented the issue, the Eight Circuit has held that an "actual innocence" claim does not toll the one-year statute of limitations. *Flanders v. Graves*, 299 F.3d 974, 976 (8th Cir. 2002). By contrast, the Tenth Circuit has held that "AEDPA's one-year statute of limitations is subject to equitable tolling . . . when a prisoner is actually innocent." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000). These cases demonstrate that there is not only a conflict in the circuit courts of appeal regarding the issue, but also that the lower courts are

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[3] This has prompted some commentators to argue that the "federal appellate courts' apparent reluctance to address the constitutional issue may in some cases have led them to apply an unduly harsh standard of proof to petitioners claim of actual innocence." Zheng, Comment, "Actual Innocence as a Gateway Through the Statute-Of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions", 90 Cal. L. Rev. 2101, 2107 n. 19 (2002). It is Petitioner's position that in this case the lower court deviated from the *Schlup* test and did in fact apply a higher standard of proof to Petitioner's "actual innocence" claim.

uncertain about how to proceed, and therefore in need of guidance from this Court[4].

Concomitantly, the issue of whether there is an "actual innocence" exception to the one-year statute of limitation in § 2244(d)(1) raises an important issue of federal law "that has not been, but should be, settled by this Court". As this Court has recognized on numerous occasions, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). The writ of habeas corpus, which is often referred to as the Great Writ because it serves as the "symbol and guardian of individual liberty", is the vehicle by which innocent persons can right a manifest injustice. *Peyton v. Rowe*, 391 U.S. 54, 58 (1968). Accordingly, notwithstanding the fact that a petition for habeas corpus may be procedurally barred, this Court has developed an "actual innocence" exception that serves as a "safety valve" for those cases where a potentially innocent petitioner has no other avenue for relief. *Schlup*, 513 U.S. at 320 - 22, 333; *Harris v. Reed*, 489 U.S. 255, 271 (1989)(O'CONNER, J., concurring). Because this Court has consistently recognized the need for a "safety value" to protect those petitioners who are "actually innocent", and the one year statute of limitations in § 2244(d)(1) stands as a bar to all petitions filed outside of limitations period, this Court must resolve the important question of whether the body of habeas corpus law developed in its pre-

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[4] The Third Circuit has not yet decided whether actual innocence can be used to bring an untimely petition under the AEDPA.

AEDPA decisions, which recognize an "actual innocence" exception to procedurally barred claims, applies to initial petitions filed outside of the one year limitations period in § 2244(d)(1).

In addition, as the instant case illustrates, this Court must resolve related questions regarding the standard of proof required to state a claim for actual innocence, and whether, as the court below held, an initial petition for habeas corpus can be denied because the petitioner failed to exercise due diligence in bringing the actual innocence claim to court. A35. Resolution of these important issues will provide guidance to the lower courts and ensure a consistent and equitable approach to these difficult questions.

ARGUMENT

I. The actual innocence exception to procedurally barred habeas corpus petitions applies to initial petitions filed outside of the one year statute of limitations in § 2244(d)(1).

Prior to the enactment of the AEDPA, this Court consistently held that procedurally barred habeas petition's should be heard where there is a "colorable

claim of factual innocence"[5]. *Kuhlman v. Wilson*, 477 U.S. 436, 455, n. 17 (plurality opinion); *see also, Murray v. Carrier*, 477 U.S. 478, 496 (1986); *McCleskey v. Zant*, 477 U.S. 467, 495 (1991)(miscarriage of justice "serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty."); *Schlup*, 513 U.S. at 319-21 (reviewing evolution of "actual innocence" exception to procedurally defaulted claims). In holding that a claim of "actual innocence" serves as an exception to procedurally barred habeas petitions, this Court has reasoned "that habeas corpus is, at its core, an equitable remedy". *Schlup*, 513 U.S. at 319-320. It was against this background of well-established law that Congress enacted the provisions of the AEDPA, and a review of the Act revels an attempt by Congress to craft a statute that was consistent with the prior habeas precedent of this Court. *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003)("Congress acts against the background of existing decisional doctrine unless it negates the doctrine."); Sussman, *supra*, 27 N.Y.U Rev. L. & Soc. Change at 352 -56.

On its face, § 2244(d)(1)is silent on the issue of an "actual innocence" exception to the one-year

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[5] Petitioner is not contending that there is a free standing constitutional claim based on "actual innocence", but rather, is using the evidence of "actual innocence" as a gateway to have "his otherwise barred constitutional claims considered on the merits." *Schlup*, 513 U.S. at 315. Those otherwise barred constitutional claims involve a number of violations of the Petitioner's Sixth Amendment rights, including, but not limited to, a defective jury charge on the element of malice, improper use of photographic evidence and improper references to photographic evidence and improper and prejudicial comments by the prosecutor in closing arguments. A60-62.

limitations period[6]. However, in construing this provision, the majority of the circuit courts of appeal have held that the limitation period is not a jurisdictional requirement, but rather, a statute of limitation, and therefore subject to the doctrine of equitable tolling. *Dunlap v. United States*, 250 F.3d 1001, 1004, n.1 (6th Cir. 2001); *see also Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *Smith v, McGinnes*, 208 F.3d 13, 17 (2d Cir.) *cert. denied* 531 U.S. 840 (2000); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Calderan v. United States District Court for the Central District of California*, 163 F.3d 530, 541 (9th Cir. 1998)(en banc); *Miller v. N.J. Department of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998).

While the legislative history regarding § 2244(d)(1) is scant[7], in light of the Congress' concern with accommodating prior Supreme Court precedent, and this Court's unwavering adherence to the principle that it is "far worse to convict an innocent man than to let a guilty man go free"[8], section 2244(d)(1)'s silence on

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[6] While § 2244(d)(1) is silent on the issue of "actual innocence", § 2244(b)(2)(B)(ii) does provide that a successive petition may be brought where there is newly discovered evidence from which "no reasonable factfinder would have found the applicant guilty of the underlying offense".

[7] The legislative history reveals only two comments on § 2244(d)(1)'s impact on "actual innocence" claims. *See* 142 Cong. Rec. H3602 (daily ed. Apr. 18, 1996)(comments of Rep. Watt); 142 Cong. Rec. H3614 (daily ed. Apr. 18, 1996)(comments of Rep. Pelosi).

[8] *Schlup*, 513 U.S. at 325(quoting *In re Winship*, 397 U.S. 358, 372 (1970)(Harlan, J., concurring)).

the issue of "actual innocence" should not be read as an attempt by Congress to abrogate this Court's equitable powers in the area of initial habeas petitions or to eliminate the "actual innocence" exception to procedural bars on first petitions[9].

Indeed, this Court has recognized that the "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (emphasis in original). In reaching this conclusion, the Court noted that the policy considerations that require restrictions on successive petitions -- the states interest in finality and the fact that successive petitions are less likely to lead to the discovery of unconstitutional punishments, do not apply to first petitions. *Id.* at 324. Significantly, at the time the Court decided *Lonchar*, Congress was in the process of enacting § 2244(d)(1). Mindful of the restrictions Congress was contemplating for initial habeas petitions, this Court cautioned that "the interest in permitting federal habeas review of a first petition is quite strong . . .[and] any rule that would deprive inmates of all access to the writ should be both clear and fair." 517 U.S. at 330.

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[9] Section 2244(b)(2)(B)(ii)'s inclusion of an "actual innocence" exception only serves to support this conclusion. Congress included this language to ensure that while the "actual innocence" exception applied to successive petitions, because of the policy concerns inherent in successive petitions ("abuse of writ"), unlike first petitions, which are governed by the *Schlup* standard, successive petitions would be subject to a higher standard of proof and the requirement of due diligence.

As stated above, this Court has recognized on a number of occasions that it would be manifestly "unfair" to allow a procedural default to bar a first habeas petition where there is evidence of "actual innocence". Accordingly, to the extent that the Third Circuit in this case, and the other circuit courts of appeal that have addressed the issue, have questioned or denied the application of the "actual innocence" exception to first petitions that are barred by the one-year limitation period in § 2244(d)(1), they are wrong as a matter of law. Nothing in the language of § 2244(d)(1) or the legislative history of the AEDPA suggests that in enacting the AEDPA Congress intended to strip this Court, or the lower federal courts, of their equitable power to remedy the manifest injustice that occurs when an innocent person is incarcerated. Consistent with a well developed line of decisions handed down by this Court, the "actual innocence" exception applies to initial habeas petitions barred by the one year statute of limitations in § 2244(d)(1). *Kuhlman, supra.; Murray, supra.; McCleskey, supra.; Schlup, supra.*

II. The Lower Court committed an error of law in requiring as a threshold matter that Petitioner establish that he acted with due diligence in bringing his first habeas petition based on newly discovered evidence of actual innocence.

Relying on the Third Circuit decision in *Fay v. Horn*[10], the District Court held that Petitioner failed to exercise due diligence in bringing his first habeas petition and therefore was barred pursuant to § 2244(d)(1) despite his evidence of "actual innocence"[11]. A32-35. As discussed above, nothing in the language of § 2244(d)(1) prohibits or limits the application of the "actual innocence" exception as developed by this Court prior to the enactment of the AEDPA. Prior to the enactment of the AEDPA, the controlling law setting forth the standard to be applied in "actual innocence" claims was this Court's decision in *Schlup*, which dealt with a second or successive petition for habeas corpus. 513 U.S. at 301.

Similar to the District Court in the instant case, in *Schlup*, the lower court had dismissed the petition for habeas corpus because the Petitioner had failed to "provide adequate cause for failing to bring his new

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10 240 F.3d 239 (3d Cir. 2001).

11 The Tenth Circuit has also held that due diligence is a threshold requirement for brining an "actual innocence" claim. *Gibson v. Klinger*, 232 F.2d 799, 808 (10th Cir. 2000).

claims more promptly."[12] 513 U.S. at 309. Rejecting this as a basis to bar a claim based on "actual innocence", this Court drew a distinction between lack of diligence by the petitioner and the claim for actual innocence, holding that the petitioner's failure to establish cause sufficient to excuse his failure to introduce the evidence at the first hearing did not bar his successive claim based on actual innocence. *Schlup*, 513 U.S. at 341; *see also Carrier*, 477 U.S. at 496 ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). Restated, this Court expressly rejected the position taken by the District Court in this case that due diligence in bringing a petition is a threshold requirement for bringing a claim based on newly discovered evidence of "actual innocence"[13]. In light of *Schlup*, the issue is not when the petitioner was in possession of the newly discovered evidence of innocence, but rather, whether the newly discovered evidence makes it "more likely than not that no reasonable juror would have convicted him in light of the new evidence." 513 U.S. at 327.

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[12] Although this is couched in "cause and prejudice" language as opposed to "due diligence", the substance of the procedural bar is the same, i.e., the petitioner failed to bring the new claim in a timely fashion.

[13] Viewed from the perspective of this Court's decision in *Schlup*, the "cause and prejudice" standard and the "due diligence" standard are nothing more than procedural bars preventing a potentially innocent petitioner from righting a manifest injustice. As such, they can not be used to block an otherwise valid claim of innocence.

While successive petitions are now controlled by§ 2244(b)(2)(B)(ii), which does have a due diligence requirement, pursuant to *Schlup* there is no due diligence requirement for first petitions nor should there be. As stated above, this Court has held that there is a substantive difference between first and successive petitions for habeas corpus and that the "[d]ismissal of a first petition is a particularly serious matter". *Lonchar*, 517 U.S. at 325. Unlike first petitions, successive petitions are subject to abuse, which often results in "improper delay, expense, complexity, and interference with the State's interest in the 'finality' of its own legal processes." *Lonchar*, 517 U.S. at 323. For this reason, a due diligence requirement regarding a second or successive petition makes sense because it prevents a petitioner from withholding an argument or evidence on the first petition in order to delay the inevitable. As this Court has noted, these same policy concerns do not apply to a first petition, and accordingly, "the interest in permitting federal habeas review of a first petition is quite strong." *Id.* at 324, 330. In light of the strong interest in permitting first petitions, the rejection of a due diligence or cause requirement as a bar by this Court in *Schlup*, and the plain language of § 2244(d)(1), which, unlike § 2244(b)(2)(B)(ii) does not have a due diligence requirement, the lower court committed an error of law in holding that in order to state an "actual innocence" claim the petitioner must demonstrate that he exercised "due diligence" in bringing the petition.

III. The lower court committed an error of law by applying a more stringent standard than that set forth by this Court in Schlup for determining whether Petitioners newly discovered evidence was sufficient to establish an "actual innocence" claim.

As this case illustrates, in an effort to circumvent the question of whether there is an "actual innocence" exception to § 2244(d)(1), the lower courts are applying a stricter standard of proof than articulated by this Court in *Schlup* to determine if the newly discovered evidence is sufficient to establish a claim for "actual innocence". Zheng, 90 Cal. L. Rev. at 2107 n. 19. In *Schlup*, this Court held that in order to satisfy the "actual innocence" exception a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 513 U.S. at 327(quoting *Carrier*, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more probable than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* The Court also held that in applying this standard, the "analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt an innocence." *Id.* at 328. Because analysis under the standard is governed by the "beyond a reasonable doubt" requirement, a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Schlup*, 513 U.S. at 331.

Applying the above standard, the Court in *Schlup* held that the affidavit testimony of several eyewitnesses who averred that the Petitioner was not involved in the crime was sufficient to satisfy the test. As the Court observed, "[t]hose new statements may, of course, be unreliable. But if they are true . . . it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Id.* at 331. Like the petitioner in *Schlup*, in the instant case the Petitioner introduced a number of affidavits from eyewitness who claimed that the Petitioner could not have possibly been involved in the crime. A65-80. Without holding a hearing to determine the reliability of the these eyewitnesses' testimony, the lower court impermissibly discounted them as insufficient. A6, 18.

In reaching this conclusion, the lower court ignored the teachings of *Schlup*, and *sua sponte* added additional burdens to the "actual innocence" analysis. Specifically, the lower court held that "the new evidence was not particularly compelling because: (1) it does not in any way detract from the probative value of the Commonwealth's evidence which showed the defendants discussed the crime before it happened and which showed they divided the proceeds of he crime and discussed the victim's fate after the crime happened; and (2) none of the new witnesses admitted to being part of a plan to rob the victim with force and to kill the victim." A18. As to the first finding - - that the evidence does not detract from the probative vale of the Commonwealth's evidence, the lower court ignored *Schlup's* holding that a "petitioner's showing of innocence is not insufficient solely because the trial

record contained sufficient evidence to support the jury's verdict." *Schlup*, 513 U.S. at 331. In regard to the second finding, that none of the eyewitnesses were involved in the commission of the crime and therefore there testimony is not credible, this an impermissible credibility determination that the lower court was not at liberty to make without first conducting a hearing. *Schlup*, 513 U.S. at 331. When the standard set forth by this Court in *Schlup* is applied, it is clear that the Petitioner introduced sufficient evidence to "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

At trial, neither the Commonwealth nor the defense presented the testimony of any actual eyewitness to the shooting itself. The most that the witnesses that were presented could testify to was either hearing a gunshot while Petitioner was still inside the bar or seeing two other men go through the victim's pockets after the shooting. The testimony of the affiants, however, went well beyond the testimony presented by the witnesses at trial. Specifically, Freeman and Key testified in affidavits to actually seeing the shooting and they positively identified the shooters as individuals other than the Petitioner and his co-defendants. A70 (Andre Key), A74 (Mark Freeman).

Moreover, the lower courts conclusion that the Petitioner failed to introduce any evidence that detracted from the probative value of the Commonwealth's evidence is wrong from both a factual and a legal perspective. In denying the

sufficiency of Petitioner's newly discovered evidence, the lower court gave paramount credence to the testimony of Lloyd, despite the fact that Lloyd vigorously denied ever making these statements to police and despite the fact that Lloyd's claim of police coercion was supported by two other witnesses, Lee and Clark. A65 (Tasha Clark). The lower court also refused to consider Clark's trial testimony and her affidavit recanting that testimony. A65 (Tasha Clark). Clearly, in light of Clark's affidavit testimony recanting her earlier statements and detailing police coercion, "it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Schlup*, 513 U.S. at 331. Moreover, as discussed above, the lower court ignored *Schlup's* teaching that a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Schlup*, 513 U.S. at 331. Here, Petitioner introduced eyewitness testimony, not available at trial, that the Petitioner was not involved in the crime. A70 (Andre Key), A74 (Mark Freeman). Accordingly, regardless of the weight given Lloyd or Clark's testimony, this newly discovered evidence, standing alone, was sufficient to satisfy the *Schlup* test.

The lower court also alleged that the evidence presented by the Petitioner was not compelling because "none of the new witnesses admitted to being part of a plan to rob the victim with force and to kill the victim." A18 "In the court's view, Mr. Key's credibility about what he claims happened would have been greatly enhanced had he admitted to participating in the

robbery and killing the victim." A18 n. 4. This is a novel requirement. Apparently, the only evidence that the lower court would have found compelling would be a full confession from the perpetrators themselves. There is no legal precedent for the lower court's requiring the Petitioner to find the guilty party and obtain a confession in order to establish his own innocence. Furthermore, as will be argued below, the lower court made these key credibility determinations based solely on the affidavits, never having had the opportunity to assess the witnesses' demeanors or test the consistency and veracity of their testimony. The addition of this burden made the lower court's analysis much more stringent than that applied by this Court in *Schlup*.

Furthermore, rather than looking at all the evidence available to the federal court in deciding whether or not Petitioner met the burden of establishing that he was more likely than not innocent, the lower court picked and chose bits and pieces of evidence and did not consider the cumulative effect of the new witnesses and the Petitioner's multiple allegations of trial and counsel error on the jury. As this Court held in *Schlup*, "[i]f a petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claim." *Id.* at 317. Had the jury heard all of the evidence now available and had several significant errors, including but not limited to the defective jury instruction on malice and improper

impeachment of defense witnesses, not been committed, the verdict likely would have been not guilty. Accordingly, the lower court's holding was contrary to the teaching of *Schlup* and had the effect of barring the Petitioner's right to file a first habeas petition.

IV. The District Court denied Petitioner due process of law in violation of the Fourteenth Amendment of the United States Constitution by denying Petitioner a hearing on his claims of actual innocence.

The standard governing a request for an evidentiary hearing is a reasonably low threshold for habeas petitioners to meet. A habeas petitioner is entitled to an evidentiary hearing if: 1) the allegations in his petition would, if proved, entitle him to relief; and 2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *Phillips v. Woodford,* 267 F.3d 966 (9th Cir. 2001). Where a petitioner raises a colorable claim to relief and where there has not been a state or federal hearing on the claim, the appellate court should remand to the district court for an evidentiary hearing. *Harich v. Wainwright,* 813 F.2d 1082 (11th Cir. 1987).

A district court cannot generally dismiss a habeas petition based on its assessment of the credibility of newly presented witness testimony without first subjecting those witnesses to cross examination to determine their veracity, reliability and all other elements, which affect the weight to be given to the testimony of a witness. *Schlup,* 513 U.S. at 331. A

petition may be dismissed without a hearing *only* when it consists solely of conclusory, unsworn statements unsupported by any proof or offer thereof. *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989)(emphasis added); *See also, Weeks v. Bowersox*, No. 95-4123 (8th Cir. 1997)(no hearing granted when the Petitioner failed to provide any affidavits from new witnesses).

Based upon the four corners of the affidavits of the above witnesses and the prior testimony of some of the affiants at a co-defendants' Post Conviction hearing, the lower court ruled on the matter of Petitioner's innocence without holding a hearing. It is Petitioner's contention that in deciding an issue as important and final as a person's actual innocence, it is insufficient to rely solely on the above. The affidavits alone do not give the court a fair opportunity to test the scope of knowledge and/or the credibility of the witness, particularly given that there were several independent claims by witnesses that their testimony had been coerced by the police and the prosecutor. Thus, based on the above testimony, the allegations in his petition would, if proved, entitle Petitioner to relief. Therefore, Petitioner met the first prong of the *Phillips* test.

Petitioner also satisfies the final prong of the test: the state court trier of fact has not, after a full and fair hearing on the parties' claims, reliably found the relevant facts. It is not sufficient to rely upon the transcript of a PCRA hearing of a co-defendant where that defendant's interests were at issue and not the Petitioner's. Petitioner was not even present at the co-defendant's PCRA hearing and therefore, did not have

any opportunity to question those witnesses to elicit additional and/or clarifying evidence, particularly that which related solely to him. Petitioners right to present and confront witnesses on his own behalf and his right to due process would be violated by the adoption of testimony obtained in a co-defendant's hearing which excluded him. For these reasons, the lower court in this case denied the Petitioner due process when it failed to conduct a hearing to determine the reliability/credibility of Petitioner's newly discovered affidavit testimony.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari to resolve the conflict in the circuits and these important issue of law regarding habeas corpus relief.

Respectfully submitted,

By: /s/ Thomas Bruno, II

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CPS-94 January 23, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **03-3540**

ANTHONY JOHNSON,
Appellant

vs.

JOHN MCCULLAH; ET AL.

(E.D. PA. CIV. NO. 02-CV-01469)

Present: ALITO, FUENTES and CHERTOFF,
Circuit Judges

Submitted is Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1) with memorandum of law in support

in the above-captioned case.

Respectfully,

Clerk

MMW/JDM/clw

FILED: March 5, 2004
[ENTERED: March 5, 2004]

ORDER

The foregoing request for a certificate of appealability (COA) is denied. The District Court dismissed Appellant's 28 U.S.C. § 2254 habeas petition as untimely filed under the one-year limitations period of 28 U.S.C. § 2244(d), and it rejected Appellant's claim of "actual innocence" as a basis to excuse the untimely filing. Assuming arguendo that there exists an actual-innocence exception to the habeas statute of limitations, jurists of reason could not debate that the District Court properly rejected Appellant's new evidence as insufficient under the standards of Schlup v. Delo, 513 U.S. 298 (1995). See Miller-el v. Cockrell, 123 S. Ct. 1029, 1039-40 (2003) (discussing standard for a COA). In particular, in light of the evidence at trial, the Magistrate Judge was correct that the Appellant's new evidence is largely cumulative of his trial defense, and Appellant cannot show that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Schlup, 513 U.S. at 329; see also Bousely v. United States, 523 U.S. 614, 623 (1998) (actual innocence requires petitioner to show that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him"). In short, because the District Court was plainly correct in dismissing the habeas petition as time-barred, a COA is denied.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

Dated: March 5, 2004

CH/cc: Teri B. Himebaugh, Esq.
Thomas W. Dolgenos, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY JOHNSON	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN McCULLAH, et al.	:	NO. 02-1469

FILED: July 22, 2003
[ENTERED: July 24, 2003]

ORDER

AND NOW, this 22 day of July, 2003, after careful and independent consideration of the petition for a writ of habeas corpus, the other documents filed by the parties and after review of the Supplemental Report and Recommendation of Diane M. Welsh, United States Magistrate Judge, it is hereby ORDERED that:

1. The Supplemental Report and Recommendation is APPROVED and ADOPTED; Petitioner's Objections are overruled.

2. The petition for a writ of habeas corpus is DISMISSED as time-barred; and

3. For the reasons contained in Judge Welsh's Supplemental Report and Recommendation, a certificate of appealability is not granted.

BY THE COURT:

/s/ Edmund Ludwig
LUDWIG, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY JOHNSON	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN McCULLAH, et al.	:	NO. 02-1469

FILED: March 17, 2003
[ENTERED: March 17, 2003]

ORDER

The petitioner has filed a motion requesting a hearing. In the motion, the petitioner wants the court to schedule an evidentiary hearing to take testimony from the six persons who have submitted affidavits in support of his claim of actual innocence. In a Supplemental Report and Recommendation ("SRR") filed today, the court has explained why these six affidavits do not satisfy the actual innocence standard required by Schlup v. Delo, 513 U.S. 298 (1995). The court is of the view that the SRR adequately addresses the actual innocence question and that an evidentiary hearing would not aid in the resolution of that question.

Accordingly, this 17th day of March, 2003, it is ORDERED that the petitioner's motion requesting a hearing (Document No. 10) is DENIED.

BY THE COURT:

/s/ Diane M. Welsh
DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY JOHNSON	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN McCULLAH, et al.	:	NO. 02-1469

FILED: March 17, 2003
[ENTERED: March 17, 2003]

SUPPLEMENTAL REPORT AND RECOMMENDATION

DIANE M. WELSH MARCH 17, 2003
UNITED STATES MAGISTRATE JUDGE

I. Background

On April 24, 2002, the petitioner filed a counsel petition for a writ of habeas corpus. On July 19, 2002, the court issued a Report and Recommendation ("R&R") which found that the habeas petition was time-barred. The petitioner has conceded that his petition was time-barred but has sought to avoid the time bar by arguing that he is actually innocent of the charged offense. The R&R declined to address the petitioner's claim that he is actually innocent and, instead, concluded that the petitioner had not been diligent in pursuing his claims because he could have filed a timely habeas petition in August 1997 and had not. The petitioner then filed objections to the R&R. On August 14, 2002, the Honorable Edmund V.

Ludwig issued an order referring the case back to the undersigned for consideration of the petitioner's claim of actual innocence.

The petitioner's claim of actual innocence is based upon affidavits from six different people. These affidavits, to varying degrees, suggest that the petitioner and his two co-defendants were not involved in the charged murder. On August 30, 2002, the petitioner filed a motion requesting a hearing to take testimony from the six persons who had filed affidavits. The court ordered the District Attorney for Philadelphia County to respond to this motion and she did so on October 30, 2002. The District Attorney also provided the court with transcripts from 1998 evidentiary hearings held for Curtis Manning, one of the petitioner's co-defendants. Five of the six persons who have signed the affidavits submitted by the petitioner testified at Mr. Manning's evidentiary hearings. In addition, the Court of Common Pleas for Philadelphia County produced the state court record for this court on December 17, 2002. The state court record did not contain the trial transcripts, which this court needed to evaluate the petitioner's claim of actual innocence, but the District Attorney subsequently provided the court with copies of the trial transcripts.

II. Actual Innocence Standard

In Schlup v. Delo, 513 U.S. 298 (1995), the Supreme Court announced the standard for actual innocence that would constitute a fundamental miscarriage of justice. The petitioner is required to present new, reliable evidence that was not presented

at trial. Id. at 324. The new evidence the petitioner presents "must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. at 327. The Court noted that claims of actual innocence should be rare and extraordinary and that the burden of proof imposed on the habeas petitioner is designed to insure only rare and extraordinary cases are heard. Id. at 321, 324.

III. Application of Actual Innocence Standard

In order to apply the actual innocence standard, it is necessary to summarize the evidence produced at trial. The prosecution's version of what occurred was the following. On December 8, 1986, Curtis Manning borrowed a black Cadillac from Shawn Ennis, a friend of his. (N.T. 5/20/88 at 9-11). That evening, Curtis Manning and Gerald James met the petitioner at the home of Annette Lloyd, the petitioner's girlfriend. (N.T. 5/13/88 at 15-16). While the three men were there together, Ms. Lloyd heard them discuss going out to rob Barry Smith. Id. at 21. Before they left, Ms. Lloyd saw that Gerald James had a silver colored handgun in his waistband. Id. The petitioner, Gerald James and Curtis Manning left Ms. Lloyd's house in a black Cadillac. Id. 23. They went to the Elbow Bend bar in Philadelphia. Once inside the bar, the three approached Barry Smith and spoke to him at the pinball machine at the back area of the bar. (N.T. 5/11/88 at 24, 27). After some time passed, the three left the bar and, shortly thereafter, Barry Smith also exited the bar. Id. at 27. While outside the bar, Gerald James shot Mr. Smith and he and one of the other two

went through Mr. Smith's pockets and stole some money.[1]

After taking money from the victim, the three fled in the black Cadillac.[2] They went back to the home of Annette Lloyd to divide the money they had stolen. (N.T. 5/13/88 at 25-27). While there, Curtis Manning asked Gerald James whether he thought Mr. Smith was dead. Id. at 27. Gerald James said he thought so and the three laughed about it. Id. at 27-29. The three then went to the home of Tasha Clarke, Gerald James' girlfriend, in Camden, New Jersey. (N.T. 5/23/88 at 10). Over the next few weeks, the petitioner and Gerald James stayed to sleep at Tasha Clarke's house on some days but Curtis Manning did not. Id. at 13-14.

On December 17, 1986, Philadelphia Police executed a search warrant at the home of Tasha Clarke. (N.T. 5/16/88 at 55-60). None of the three defendants were there but a silver colored revolver was found hidden in the basement's drop ceiling. (N.T. 5/19/88 at 56, 67). Tasha Clarke used the basement as her bedroom and, after December 8, 1986, she spent evenings there with Gerald James. (N.T. 5/23/88 at 13). In the same room, the police found a picture of Gerald James and another man. (N.T. 5/19/88 at 55). In the picture, Gerald James was holding what

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[1] The Commonwealth did not present any witness who witnessed Barry Smith being shot and killed. This sentence is an inference drawn from the evidence already summarized and the evidence that will follow.

[2] This sentence is also an inference drawn from the evidence already summarized and the evidence that will follow.

appeared to be the revolver the police had found in the basement. Id.

Barry Smith had died from a single gunshot wound to the head. (N.T. 5/23/88 at 24-25). During the autopsy, the medical examiner recovered the bullet, which had broken into two pieces, from Mr. Smith's body. Id. at 25. The fragments were examined by a ballistics expert. Id. at 31. The fragments were too damaged to be conclusively matched to the revolver that had been recovered from Tasha Clarke's bedroom. Id. at 32-33, 37. However, the ballistics expert did state that the fragments were of a caliber consistent with the revolver. Id. at 32, 35, 37.

The petitioner was arrested on January 25, 1987 in Philadelphia. (N.T. 5/20/88 at 48-50). Curtis Manning was arrested on January 21, 1987 in Delaware County; he was using an alias. Id. at 51-52. Gerald James was arrested on February 5. 1987 in Philadelphia; he was using an alias as well. Id. at 53-54.

The petitioner, Gerald James, and Curtis Manning were all tried together. They did not testify at their trial but they did present evidence through other witnesses. One defense witness, Ralph Cathell, was inside the Elbow Bend bar on December 8, 1986. He saw the victim speaking to two men, Rob and Tuck. (N.T. 5/26/88 at 5). The victim went outside with Rob and Tuck. Id. at 6-7. Some time later, Mr. Cathell heard a shot and he went outside. Id. at 7. He saw Rob and Tuck going through the victim's pockets. Id. He looked across the street and saw Gerald James and

Curtis Manning in a car. Id. at 8. He had not seen either of them inside the bar. Id.

Another defense witness, Diana Sapp, was also inside the Elbow Bend bar on December 8, 1986. She was sitting at the bar when she noticed Curtis Manning. (N.T. 5/25/88 at 41). She also saw Gerald James in the bar but was not sure if she saw the petitioner. Id. at 42. While sitting at the bar, she heard a gunshot. Id. at 41. After hearing the shot, she went outside. Id. at 43. Gerald James was going out the door in front of her and Curtis Manning was behind her; Mr. Manning almost knocked her down on the way out the door. Id.

The defense also called Darrel Malone to testify. Mr. Malone was a drug dealer on December 8, 1986. (N.T. 5/24/88 at 3). On that day, he was on his way to deliver narcotics to the victim at the Elbow Bend bar. Id. at 4. When he got there, he saw the victim outside the bar. Id. at 6. He saw two men come out of the bar and join the victim. Id. Mr. Malone recognized them, they were not any of the defendants. Id. One of the men was called Kevin. Id. at 10. He saw the two men grab the victim and he heard a shot. Id. at 6-7. After hearing the shot, he left the scene. Id. at 7.

The new evidence the petitioner has submitted consists of affidavits from six people: Tasha Clarke, Karen Mathis, Abdel Bey, John Carvalho, Andre Key and Mark Freeman. Of these six, only Tasha Clarke testified at trial. The court will describe the contents of each affidavit before addressing whether the affidavits meet the Schlup standard.

Tasha Clarke's affidavit consists of three handwritten pages and was prepared on December 4, 1988, approximately six months after the petitioner's trial ended. In her affidavit, Ms. Clarke, who was Gerald James' girlfriend, seeks to recant the statement she gave to police in December 1986 as well as her trial testimony, which was largely consistent with her police statement. She claims that Detective Piree and the District Attorney coerced her into testifying falsely by threatening to have her arrested and charged as an accomplice to murder. She also states that, during her trial testimony, she was intoxicated on codeine "because my nerves were bad."

In her November 22, 1996 affidavit, Karen Mathis states that the night Barry Smith was killed, she was working as a barmaid at the Elbow Bend bar. She saw Barry Smith playing pinball inside the bar when two or three men came up to him. She says all of the men were about the same height as Mr. Smith, which was about five feet, nine inches.[3] Some time later, two of the men walked out of the bar with Mr. Smith. She the heard a noise outside the bar. Shortly after she heard the noise, someone walked in the bar and said Mr. Smith had been shot.

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[3] The court notes that this affidavit, along with the remaining four, were originally produced for the benefit of Curtis Manning. The height of the people who spoke to the victim is especially important to Mr. Manning because, it is asserted in this affidavit (and in the some of the others), that Mr. Manning is six feet, five inches tall. This would make him several inches taller than the victim and, according to John Carvalho, several inches taller than the petitioner and Gerald James.

Abdel Bey's affidavit of March 31, 1997 is accompanied by a copy of the statement he gave to police on December 9, 1986. Mr. Bey states that, on the night the victim was killed, he was a DJ and bartender at the Elbow Bend bar. He refers to his police statement, which indicates the victim was with two or three men. His police statement says he saw the victim playing pinball in the bar and two or three men were standing with him. Mr. Bey then went to the bathroom. After two or three minutes, he came out of the bathroom and the victim and the other men were gone. In his affidavit, Mr. Bey states that he does not recall whether the three defendants were in the bar that night. He also states that the tallest of the men who he saw with the victim was five feet nine or five feet ten inches tall.

In his December 20, 1996 affidavit, John Carvalho states that he was inside the Elbow Bend bar on the night the victim was killed. He states that he saw the victim go outside the bar and he did not notice if anyone was with the victim. When he heard the gunshot, the three defendants were inside the bar. On his way out the door of the bar, he bumped into Curtis Manning. Once outside the bar, he saw the victim on the ground and two men were going through the victim's pockets. At the same time, he saw the petitioner and Gerald James sitting in a car across the street. Mr. Carvalho states that the two men going through the victim's pockets were short and he implies that they were shorter than any of the three defendants. He states that Curtis Manning was six feet, finches tall, the petitioner was five feet, ten inches tall and Gerald James was five feet, nine inches tall.

In his February 26, 1997 affidavit, Andre Key states that, at the time the victim was killed, he sold drugs for a man named Stephan. On the night the victim was killed, he and Kevin Taylor went with Stephan and a man he knew as Smoke to the Elbow Bend bar to obtain narcotics. Smoke stayed in the car and he, Stephan and Mr. Taylor went inside. Stephan and Mr. Taylor went to speak to the victim at the pinball machine. The four of them then left the bar. Stephan and the victim were in front of Mr. Key and Mr. Taylor and they start arguing. Stephan tried to take something from the victim's pockets, the victim pushed him and Stephan pulled gun from his waistband and shot the victim. Mr. Key states he had no idea that Stephan was going to shoot the victim and he and Mr. Taylor ran away once they saw the shooting.

In his June 19, 1996 affidavit, Mark Freeman states that he was walking along the street outside the Elbow Bend bar on December 8, 1986. As he reached the bar, he saw a man named Stephan McKellop holding the victim by his collar and putting a gun to the victim's head. He saw another man going through the victim's pockets. The gun went off and the victim fell to the ground. He saw Stephan and the other man jump into a car that pulled away. He knew the three defendants and did not see any of them during the time the victim was killed. He left the scene once the police arrived.

Five of the people who provided affidavits, Karen Mathis, Abdel Bey, John Carvalho, Andre Key, and Mark Freeman, testified at the Post Conviction

Relief Act hearings that were held in 1998 for Curtis Manning. The court has reviewed the transcripts of their testimony. In large part, the testimony these witnesses gave was consisten with their affidavits and so the court will rely upon the affidavits in its Schlup analysis.

In her affidavit, Tasha Clarke recanted her police statement and her testimony at trial. In the summary of the Commonwealth's evidence given above, no mention has been made of the evidence Ms. Clarke provided at trial. The court notes that Ms. Clarke's trial testimony tended to incriminate the petitioner and his co-defendants. However, the court will disregard her trial testimony for purposes of considering the question of actual innocence. By disregarding Ms. Clarke's trial testimony, which has not been mentioned in the summary of the Commonwealth's case provided above, her affidavit becomes irrelevant because the only thing it serves to do is recant her trial testimony and her police statement which was consistent with her trial testimony.

Taken together, the affidavits of the remaining five persons support the conclusion that men other than the three defendants approached the victim while he was playing pinball at the Elbow Bend bar. These other men then went outside with the victim, robbed him and killed him. The court notes that this alternative theory of what transpired on December 8, 1986 was presented to the jury through the three witnesses the defense called at trial. Thus, the testimony the new witnesses would provide is cumulative because it provides additional support for a

theory that had been presented at trial. Further, this new evidence is not particularly compelling because: (1) it does not in any way detract from the probative value of the Commonwealth's evidence which showed the defendants discussed the crime before it happened and which showed they divided the proceeds of the crime and discussed the victim's fate after the crime happened; and (2) none of the new witnesses admitted to being part of a plan to rob the victim with force and to kill the victim.[4] For all these reasons, the court finds that the petitioner has not sustained his heavy burden to prove, in light of the additional evidence, that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.

IV. Diligence

The court will also address an issue related to the question of diligence that the petitioner has raised in his objections. In the R&R, the court noted that the petitioner had filed a second petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541 et seq., on January 10, 1997 and that he had failed to timely appeal its dismissal on July 16, 1997. This means that his second PCRA petition

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[4] Andre Key did claim that he went to the Elbow Bend bar with the person who shot the victim and that he was outside the bar with that person when the victim was shot. However, Mr. Key also denies any knowledge of a plan to rob and kill the victim. In the court's view, Mr. Key's credibility about what he claims happened would have been greatly enhanced had he admitted to participating in the robbery and killing the victim. Absent this admission, Mr. Key's affidavit appears to have been carefully fabricated in order to provide some aid to the defendants while still leaving him free from all responsibility for the crime.

ceased to pend upon the expiration of the time to appeal, which was on August 16, 1997. See Swartz v. Meyers, 204 F.3d 417, 420 (3d Cir. 2000); Pennsylvania Rule of Appellate Procedure 903(a). The R&R noted that, at that time, the petitioner could have filed a timely habeas petition and, if the District Attorney had argued that some or all of his claims were procedurally defaulted, the petitioner could have used his actual innocence evidence in an attempt to avoid the defaults. In his objections, the petitioner argues that the actual innocence exception for procedurally default claims was not clearly established by August 16, 1997. As will be explained, this argument is erroneous.

In 1991, the Supreme Court decided Coleman v. Thompson, 501 U.S. 722 (1991). In that case, the Court held that procedurally defaulted claims can only be reviewed if the petitioner can establish cause and prejudice for the default or that the failure to review the defaulted claims will result in a fundamental miscarriage of justice. Id. at 750. In 1995, the Supreme Court decided Schlup v. Delo, which explained that a fundamental miscarriage of justice exists where the petitioner is actually innocent. Schlup, 513 U.S. at 321-22. As the court has already noted earlier in this opinion, Schlup also explains how the actual innocence exception is to be applied. It is true that Schlup was a case involving an abuse of the writ rather than a procedural default so one might argue that Schlup did not clearly establish that actual innocence could excuse a procedural default. However, on September 19, 1996, the Third Circuit decided Sistrunk v. Vaughn, 96 F.3d 666 (3d Cir. 1996). In Sistrunk, the Third Circuit was faced with a procedurally defaulted claim. The court

held that Sistrunk's defaulted claim could only be reviewed if he demonstrated cause and prejudice for the default or if he could establish that he was innocent of the crimes for which he was convicted. Sistrunk, 96 F.3d at 675. Since Sistrunk could not, his defaulted claim could not be reviewed on its merits. Id.

The preceding summary of the relevant case law indicates that, in this circuit, it was well established almost one year before August 16, 1997 that actual innocence could excuse a procedural default and permit review on the merits of procedurally defaulted claims. Thus, the petitioner's contention in his objections that he could not have known of this when he was deciding whether to file a habeas petition or, instead, a third PCRA petition is simply without merit.

V. Certificate of Appealability

The question remains whether a certificate of appealability ("COA") should be granted. Since the court recommends disposing of the habeas petition on a procedural basis, in order for the petitioner to obtain a COA, he must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Further, the Supreme Court emphasized that, since the petitioner must make showings with respect to the procedural issue and an underlying, constitutional issue, a court may resolve the COA question if either showing is lacking. Id. at 484-85.

In this case, the petitioner does not dispute that his petition is time-barred. The relevant procedural questions the court has resolved concern whether the petitioner can demonstrate he is actually innocent under the standard announced in Schlup v. Delo and whether, if he can, he has shown that he was diligent in pursuing his claims. The court is of the view that reasonable jurists would not debate whether the petitioner has satisfied the high burden imposed upon him by Schlup v. Delo and so a certificate of appealability should not be granted.

At the petitioner's trial, the Commonwealth presented a strong circumstantial case which included testimony showing that he and his two co-defendants discussed robbing the victim before doing so, divided the money stolen after robbing the victim, and discussed whether the victim they had shot was dead. This was coupled with evidence showing the defendants were at the bar talking with the victim and walked out of the bar shortly before the victim left the bar and was shot to death. The new evidence the petitioner presents does not in any way detract from the probative value of the testimony which showed that the three defendants discussed the crime before it happened and which showed that they divided the proceeds of the crime and discussed the victim's fate after the crime happened. In the court's view, the Schlup v. Delo question would be debatable among reasonable jurists if the Commonwealth's case had been weaker, for example by lacking the evidence which showed the defendants discussed the crime before it happened and divided the proceeds of the crime after it happened, or if the nature of the new

evidence was more compelling, for example, if one of the new witnesses were to confess to being part of a plan to rob the victim with force and to kill the victim.[5] Absent these circumstances, the court concludes that jurists of reason would not debate the Schlup v. Delo question presented in this case and, therefore, a certificate of appealability should not be granted.[6]

My recommendation follows.

RECOMMENDATION

AND NOW, this 17th day of March, 2003, for the reasons contained in the preceding Report, it is hereby RECOMMENDED that the petition for a writ of habeas corpus be DISMISSED as time-barred and that a certificate of appealability not be granted.

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[5] As noted above, Andre Key did claim that he went to the Elbow Bend bar with the person who shot the victim and that he was outside the bar with that person when the victim was shot. However, Mr. Key also denies any knowledge of a plan to rob and kill the victim. In the court's view, Mr. Key's credibility about what he claims happened would have been greatly enhanced had he admitted to participating in the robbery and killing of the victim. Absent this admission, Mr. Key's affidavit appears to have been carefully fabricated in order to provide some aid to the defendants while still leaving him free of all responsibility for the crime.

[6] Because the court has concluded that no COA should be granted with respect to the question of actual innocence, it is not necessary to consider granting a COA with respect to the question of the petitioner's lack of diligence in presenting his claims.

/s/ Diane M. Welsh
DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY JOHNSON	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN MCCULLAH, et al.	:	NO. 02-1469

FILED: August 15, 2002
[ENTERED: August 16, 2002]

ORDER

AND NOW, this 14th day of August, 2002, upon review of Magistrate Judge Welsh's Report and Recommendation and the objections of petitioner Anthony Johnson, the objections are referred to Judge Welsh for a supplemental Report and Recommendation.

The Report and Recommendation, issued July 19, 2002, advises that the petition should be dismissed as time-barred. The magistrate judge found that equitable toling did not apply, because petitioner had not diligently pursued his claims. See Report and Recommendation at 5-6, see also Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000). Petitioner objects on the following grounds: (1) actual innocence alone is sufficient to toll the statute of limitations, without a showing of diligence; and (2) the actual innocence exception for procedural defaults was not a clearly established case precedent at the time petitioner is alleged not to have diligently pursued his claim.

Our Court of Appeals has not yet ruled on whether actual innocence can excuse an untimely habeas petition and whether a showing of diligence is also required. In Lucidore v. New York State Div. of Parole, 209 F.3d 107, 109 (2nd Cir. 2000), the Court of Appeals for the Second Circuit declined to consider this issue: "Because we conclude that Lucidore has not demonstrated 'actual innocence,' we do not reach the question of whether the Constitution required that we assume the existence of an 'actual innocence' exception to AEDPA's limitations period." Similarly, it is not necessary to reach that question here unless petitioner can submit new reliable evidence showing "that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327-28, 115 S. Ct. 851, 867, 130 L.Ed. 808 (1995). Accordingly, the petition is referred to Judge Welsh for a supplemental Report and Recommendation on whether petitioner has met this burden.[1]

/s/ Edmund V. Ludwig
Edmund V. Ludwig, J.

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[1] Petitioner has offered affidavits of six witnesses, which, he asserts, exculpate him.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY JOHNSON	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN McCULLAH, et al.	:	NO. 02-1469

FILED: July 19, 2002
[ENTERED: July 22, 2002]

REPORT AND RECOMMENDATION

DIANE M. WELSH July 19, 2002
UNITED STATES MAGISTRATE JUDGE

Presently before the court is a counseled petition for a writ of habeas corpus filed by a state prisoner pursuant to 28 U.S.C. § 2254. On June 3, 1988, after a jury trial in the Court of Common Pleas for Philadelphia County, the petitioner was convicted of second degree murder, robbery and criminal conspiracy.[1] He was subsequently sentenced to a life term of incarceration. The petitioner is presently incarcerated at the State Correctional Institution-Houtzdale.

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[1] The petitioner, Gerald James and Curtis Manning were charged with the robbery and shooting death of Barry Smith, which occurred on December 8, 1986 outside the Elbow Bend Bar in Philadelphia. Gerald James was determined to be the shooter and he was convicted of first degree murder.

The petition raises many claims but, as will be seen, it is unnecessary to discuss them because this case is time-barred and the court concludes that principles of equitable tolling should not save the petition. The court will recommend summarily dismissing the habeas petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.[2]

On April 24, 1996, the Antiterrorism and Effective Death Penality Act of 1996 ("AEDPA") was enacted and it imposes a one year period of limitations on habeas corpus petitions. The time period begins to run on the latest of the following:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application by State action in violation of the Constitution or laws of the United States is removed, if the applicant

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[2] Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Rule 4") provides for preliminary review of a habeas corpus petition by the court. Rule 4 also provides that:

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.

was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively available to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D). The statute also provides that "[t]he time that a properly filed application for state post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section." 28 U.S.C. § 2244(d)(2). The Third Circuit has explained that a properly filed application for state collateral relief is a "one submitted according to the state's procedural requirements, such as rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998).

The petitioner concedes that the habeas petition is untimely. See Petitioner's Memorandum of Law in Support of his Habeas Corpus Petition ("Petitioner's Memorandum") at p. 5. Nonetheless, it is necessary to

summarize the relevant state procedural history. The petitioner's conviction became final on July 26, 1991, ninety days after the Supreme Court of Pennsylvania denied his petition for allowance of appeal ("allocatur") on direct appeal. See Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999). The petitioner filed his first petition pursuant to Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S.A. §§ 9541 et seq., ("PCRA"), on February 20, 1992. He was denied relief in the trial court and, on June 27, 1995, the Superior Court of Pennsylvania affirmed the denial of relief. The petitioner did not seek allocatur. On January 10, 1997, the petitioner filed his second PCRA petition. This petition was denied on July 16, 1997 and the petitioner did not perfect a timely appeal.[3] Instead, on January 14, 1999, the petitioner filed a motion for leave

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[3] The petitioner contends that, on August 1, 1997, he attempted to file a motion for reconsideration of the July 16, 1997 decision to dismiss his second PCRA petition. See Petitioner's Memorandum at p. 4. The copy of this motion he has provided to the court is a letter dated August 1, 1997 directed to the Common Pleas Court Judge who had dismissed his second PCRA petition. See Petitioner's Exhibit 8. Curiously, the copy of the letter provided to the court is stamped as being received by the PCRA Unit on January 28, 1999. Nonetheless, the January 2, 2001 opinion of the Common Pleas Court Judge who dismissed the petitioner's third PCRA petition indicated that the prior judge had sent a letter to the petitioner on September 4, 1997 which acknowledged receipt of the petitioner's August 1, 1997 letter and advised the petitioner of his right to file an appeal. See Petitioner's Exhibit 5 at p. 5. In spite of this letter, the petitioner did not file a nunc pro tunc appeal in September 1997. Instead, he waited until January 14, 1999 to do so by way of a motion for leave to appeal nunc pro tunc. See Petitioner's Exhibit 9 at p. [3].

to appeal nunc pro tunc the July 16, 1997 dismissal.[4] Shortly thereafter, on January 28, 1999, the petitioner filed his third PCRA petition. The trial court dismissed it as untimely and the Superior Court affirmed this decision on October 15, 2001. The petitioner again did not seek allocatur. He filed his counseled habeas petition on April 24, 2002.

The petitioner asks the court to excuse the untimeliness of his habeas petition because he is actually innocent of the charges of which he was convicted. He has submitted affidavits from six different people which seek to undermine the validity of his conviction by demonstrating, to varying degrees, that some persons other than the petitioner and his two co-defendants were guilty of the charged robbery and homcide. In doing so, the petitioner declines to rely upon statutory tolling of the habeas period of limitations under 28 U.S.C. § 2244(d)(2) and he also declines to argue that some provision of 28 U.S.C. §

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[4] The court is unaware of the disposition of the motion for leave to appeal nunc pro tunc.

2244(d)(1) renders his petition timely.[5] In the absence of statutory tolling, equitable tolling may be available. See Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001).

The Third Circuit has held that the habeas period of limitations is not jurisdictional and may be equitably tolled. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, (3d Cir. 1998). The Third Circuit has explained that equitable tolling of the habeas period of limitations is available:

> only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from

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[5] There is a provision of 28 U.S.C. § 2244(d)(1) which governs new evidence like the affidavits the petitioner is relying upon. See 28 U.S.C. § (d)(1)(D). That provision starts the habeas period of limitations on the date the factual predicate for a claim could have been discovered through the exercise of due diligence. The six affidavits the petitioner relies upon are dated December 4, 1988, June 19, 1996, November 22, 1996, December 20, 1996, February 26, 1997 and March 31, 1997. The earliest affidavit could not possibly help the petitioner because it is dated prior to the enactment of the AEDPA. If, based on the last affidavit, March 31, 1997 is assumed to be the date the habeas period of limitations started to run, the habeas period of limitations would be tolled because the petitioner's second PCRA petition was pending at that time. See 28 U.S.C. § 2244(d)(2). The second PCRA petition ceased to pend upon the expiration of the time to file a timely notice of appeal. See Swartz v. Meyers, 204 F.3d 417, 425 (3d Cir. 2000). This date was August 16, 1997. See Pennsylvania Rule of Appellate Procedure 903. The habeas period of limitations would begin to run on that date and would expire one year later on August 16, 1998. Thus, 28 U.S.C. § 2244(d)(1)(D) would not prevent the habeas petition from being untimely.

> asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not enough.

Fahy v. Horn, 240 F.3d at 244 (quoting Miller, 145 F.3d at 618)). It is clear from the Third Circuit's application of equitable tolling in Fahy that, in non-capital cases like this one, the two critical considerations are the diligence of the petitioner and the presence of extraordinary circumstances.[6]

The Third Circuit has yet to hold that actual innocence can be used to consider a habeas petition which is untimely. However, the Tenth Circuit has noted that an actually innocent petitioner could demonstrate the extraordinary circumstances required for equitable tolling of the habeas period of limitations.[7] See Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000). The court is of the view that, like the Tenth Circuit, the Third Circuit will find that actual innocence is an extraordinary circumstance for

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[6] Fahy was a death penalty case. Id. at 242. The Court relied upon this fact to excuse the requirement of extraordinary circumstances, which were not present in Fahy's case, and hold that, in death penalty cases, the controlling question would be whether the petitioner reasonably and diligently asserted his claims. Id. at 244-45. Since this case is not a death penalty case, the petitioner must show both diligence and extraordinary circumstances.

[7] Like the Third Circuit, the Tenth Circuit requires both diligence on the part of the petitioner and extraordinary circumstances in order to equitably toll the habeas period of limitations. See Gibson v. Klinger, 232 F.3d at 808.

purposes of equitable tolling. However, this would still require that the petitioner show he reasonably and diligently asserted his claims. It is this issue the court considers first.

The petitioner's conviction became final in 1991, well before the AEDPA was enacted. Thus, under Third Circuit law, the habeas period of limitations could not begin to run for him until April 24, 1996 at the earliest. See Morris v. Horn, 187 F.3d at 337 (citing Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir. 1998)). On April 24, 1996, the petitioner did not have a PCRA petition pending in Pennsylvania's courts; therefore, the habeas period of limitations began to run on that day. It was tolled when he filed his second PCRA petition on January 10, 1997. By that time, 262 days of the habeas period of limitations had expired. After his second PCRA petition was denied on July 16, 1997, the petitioner did not appeal in a timely manner. Thus, the habeas period of limitations began to run again on August 16, 1997 and it expired 103 days later, well before the petitioner filed his third PCRA petition on January 28, 1999. However, on August 16, 1997, the petitioner still had 103 days to file a habeas petition. Had the petitioner done so, his habeas petition would have been timely and, if the respondent had argued that some or all of the petitioner's claims were procedurally defaulted, the petitioner could have relied upon the actual innocence exception for procedural defaults in an attempt to avoid the defaults. See Keller v. Larkins, 251 F.3d 408, 415-16 (3d Cir. 2001). He did not. Instead, the petitioner filed a third PCRA petition, which was untimely. Then, after the petitioner declined to seek allocatur with respect to his third

PCRA petition, he did not immediately file his habeas petition. Instead, he waited six months after the Superior Court affirmed the dismissal of his third PCRA petition before filing his habeas petition.

The court concludes that the petitioner cannot show that he reasonably and diligently asserted his rights. By August 16, 1997, the last date the petitioner could have timely appealed the dismissal of his second PCRA petition[8], he already had the six affidavits he now relies upon and he could have filed a habeas petition then, prior to the expiration of the habeas period of limitations. As explained above, a habeas petition filed in August 1997 would have been timely and the petitioner could have used the six affidavits in order to attempt to show his actual innocence if the respondent pled the defense of procedural default to some or all of the habeas claims. The failure to do so shows a lack of diligence. The petitioner then waited until 1999 to file a third PCRA petition. A cursory reading of the PCRA's statute of limitations would have indicated to the petitioner that the affidavits from 1996 and 1997 could not save a 1999 PCRA petition from being untimely. See 42 Pa. C.S.A. § 9545(b)(2) (requiring that an otherwise untimely PCRA petition which seeks to rely upon new evidence must be filed within 60 days of the evidence being ascertained

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[8] Under Pennsylvania law, the petitioner's letter request for reconsideration did not toll the 30 day statutory period for appeal. Cheatham v. Temple University Hospital, 743 A.3d 518, 520 (Pa. Super. 1999) (citing Moore v. Moore, 634 A.2d 163, 167 (Pa. 1993)). The 30 day statutory period for appeal could have been tolled only if the trial court had granted reconsideration within the 30 day statutory period for appeal. Id. (citing Pennsylvania Rule of Appellate Procedure 1701(b)(3)(i), (ii) and Note thereto).

through due diligence). His decision to file a third PCRA petition and to wait until 1999 to do so shows a lack of diligence. Even putting that lack of diligence aside, once the Superior Court affirmed the dismissal of the third PCRA petition as untimely, the petitioner did not file his habeas petition promptly. Instead, he waited another six months before filing. This again shows a lack of diligence on his part. Because the petitioner has shown a lack of diligence in bringing his claims to this court, the court will not recommend equitably tolling the habeas period of limitations. For this reason, it is unnecessary to decide whether the petitioner's six affidavits show he is actually innocent.

My recommendation follows.

RECOMMENDATION

AND NOW, this 19th day of July, 2002, for the reasons contained in the preceding Report, it is hereby RECOMMENDED that the petition for a writ of habeas corpus be SUMMARILY DISMISSED pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. It is also RECOMMENDED that a certificate of appealability not be granted.

/s/ Diane M. Welsh
DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY JOHNSON	:	
	:	
Petitioner	:	D.C. Ed.PA No. 02-1469
	:	
v.	:	No.
	:	
JOHN McCULLAH, et. al.	:	
	:	
Respondent	:	

FILED: August 20, 2003
[ENTERED: August 25, 2003]

NOTICE OF APPEAL

Notice is hereby given that ANTHONY JOHNSON, the Petitioner, hereby timely appeals to the U.S. Court of Appeals for the Third Circuit from a final Order issued by the Honorable Edmund Ludwig, of the U.S. District Court for the Eastern District of Pennsylvania dated July 22, 2003.

Respectfully submitted,

/s/ TERI B. HIMEBAUGH
Teri B. Himebaugh, Esq.
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY JOHNSON	:	
	:	
Petitioner	:	
	:	
v.	:	No.
	:	
JOHN McCULLAH, et. al.	:	
	:	
Respondent	:	

ORDER

AND NOW, THIS day of 2003, upon consideration of Petitioners Application for Certification of Appealability, it is hereby ORDERED and DECREED that said Application is GRANTED.

The Court will provide the parties with a briefing schedule.

BY THE COURT:

_____

J.

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Schwenksville, PA 19473
PA ID 53603
(610) 287-0216
(610) 287-3935 (facsimile)
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY JOHNSON	:	
	:	
Petitioner	:	D.C. Ed.Pa. 02-1469
	:	
v.	:	No.
	:	
JOHN McCULLAH, et. al.	:	
	:	
Respondent	:	

FILED: August 27, 2003
[ENTERED: August 27, 2003]

APPLICATION FOR
CERTIFICATE OF APPEALABILITY

Petitioner, Anthony Johnson, by and through his counsel, Teri B. Himebaugh, Esq., does hereby timely file, pursuant to Third Circuit Local Appellate Rule 22, the instant Application for Certificate of Appealability from the July 22, 2003 Final Order of the Honorable Edmund Ludwig of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's Habeas Corpus Petition. (R.R. 1).

It is Petitioner's contention that the District and State Court decisions on the issues raised below were 'contrary to' clearly established federal law. Matteo v. Superintendent, 171 F.3d 877 (3rd Cir. 1999); 28 U.S.C. § 2254(d). In support thereof, Petitioner provides the following, and incorporates by reference his Memorandum of Law appended hereto.

Scope of Review

The claims raised herein are governed by the standard of review set forth in 28 U.S.C. §2254(d). This Court has plenary review over the Order of the District Court, particularly those related to actual innocence and the statute of limitations. Jones v. Morton, 195 F.3d 153 (3rd Cir 1999); Sweger v. Chesney, 294 F.3d 506 (3rd Cir. 2002); Cabrera v. Barbo, 175 F.3d 307, 312 (3rd Cir. 1999); Zettlemoyer v. Fulcomer, 923 F.2d 284, 291 n.5 (3rd. Cir. 1991).

Procedural Posture

Petitioner is currently confined under inmate number AS3197 at the State Correctional Institution at Houtzdale.

Petitioner was tried by a jury, along with two co-defendants, Gerald James and Curtis Manning, for the December 8, 1986 robbery and murder of Barry Smith. Joseph Canuso, Esq. represented Petitioner at trial. On June 3, 1988 the jury returned guilty verdicts on all three defendants. Petitioner was found guilty of Second-Degree Murder, Robbery and Criminal Conspiracy.

Petitioner timely filed Post Trial motions, which were denied on April 24, 1989. Petitioner was sentenced to life imprisonment on the Second Degree Murder conviction, running consecutively with 5 to 10 years on the criminal conspiracy conviction.

Petitioner timely filed his Notice of Appeal with the Superior Court on May 16, 1989. Mary Zell, Esq. represented Petitioner. On September 13, 1990 the Judgment of Sentence was affirmed. [1]

Petitioner timely filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on May 15, 1990. The Petition was denied on April 26, 1991.

Petitioner filed his first Post Conviction Relief Act Petition on February 20, 1992. [2] Mitchell Strutin,

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[1] Petitioner raised the following claims on direct appeal: 1) the trial court improperly admitted the prior inconsistent statements of Lloyd, Lee and Clark as substantive evidence; 2) the trial court improperly denied Petitioner's motion to sever; and 3) Petitioner's trial counsel was ineffective for failing to preserve the above issues for appeal.

[2] Petitioner asserted the following claims in his initial PCRA: 1) error related to the failure to challenge Detective Troutner's testimony about the release of witnesses; 2) ineffectiveness and trial court error concerning testimonial references to police photographs of the Petitioner; 3) ineffectiveness and trial court error related to improper admission of a photograph of a co-defendant with a gun and related testimony of Petitioner's acquaintance with Drake inferring guilt by association; 4) error related to improper and prejudicial prosecutorial statements and; 5) appellate counsel ineffectiveness for failing to raise the above issues on appeal.

Esq. represented Petitioner and filed an Amended PCRA Petition on November 29, 1993. Another Amended PCRA Petition was filed on June 20, 1994. By Order dated December 7, 1994, Petitioners PCRA Petition was denied.

Petitioner timely filed a Notice of Appeal with the Superior Court on December 28, 1994. On June 27, 1995, the lower court Order denying the PCRA Petition was affirmed.

Petitioner filed a second PCRA Petition on January 10, 1997. [3] On July 14, 1997 Petitioner filed an amended pro se Petition. [4] Without consideration of the amended petition, on July 16, 1997 the Court denied Petitioner relief.

Petitioner requested Reconsideration of the dismissal on August 1, 1997 on the basis that the Court had not ruled on the Amended Petition, but rather only on the initial petition. On January 14, 1999 Petitioner filed a Motion for Leave to File Appeal Nunc Pro Tunc with the Superior Court.

---

[3] Petitioner alleged error related to the jury being given a defective instruction on the element of malice.

[4] The Amended Petition alleged 1) ineffectiveness of counsel in failing to investigate and call potential witnesses Carvello, Freeman, Bey, Mathis, and Key; 2) ineffective failure to properly cross-examine Clark and Fassett; 3) ineffectiveness related to failing to move for suppression of illegally seized evidence; and 4) ineffective failure of trial counsel to object to the Commonwealth's improper impeachment of defense witness, Cathell related to his 'open' arrests.

On January 28, 1999 Petitioner filed his third PCRA Petition (Motion and Amended Petition), which reasserted the claims presented in the Amended PCRA petition filed on July 14, 1997, referenced above. On February 26, 1999 Petitioner filed a pro se (amended) Petition. Two additional counseled amended Petitions were filed on December 21, 1999 and January 7, 2000.

On July 10, 2000 Petitioner was sent a letter from the chambers of the Honorable James Fitzerald, presiding judge, advising that the above Petition was listed for court action, however, the letter failed to include the mandatory Rule 1507 Notice. On August 25, 2000 the Petition was dismissed without additional argument. On October 15, 2001 the Pennsylvania Superior Court affirmed the lower court dismissal of the PCRA petition.

Petitioner filed the instant federal habeas petition on March 19, 2002. (R.R. 2-14). The instant habeas petition is Petitioner's first. As argued below, Petitioner concedes that the federal petition was untimely filed, however, he alleged 'actual innocence' as a basis for equitable tolling of the statute of limitations.

Magistrate Judge Diane Welsh issued a Report and Recommendation dated July 19, 2002 suggesting dismissal of the petition on the basis that Petitioner had not diligently pursued his claims. (R.R. 15-23). On August 14, 2002, the Honorable Edmund Ludwig issued an Order referring the matter back to Magistrate Welsh for a finding on whether Petitioner cold submit new reliable evidence showing that it is more likely

than not that no reasonable juror would have found him guilty beyond a reasonable doubt. (R.R. 24-25).

Accordingly, Petitioner submitted affidavits from various witnesses in support of Petitioner's claim of actual innocence. (R.R. 26-35). By Order and Opinion dated March 17, 2003, Magistrate Welsh denied Petitioner's request for a hearing on the issue and issued a Supplemental Report and Recommendation holding that Petitioner had not met the burden of proof under Schlup v. Delo, 513 U.S. 298 (1995). (R.R. 36-49). Petitioner timely filed Objections to the Supplemental Report and Recommendation. On July 22, 2003 the Honorable Edmund Ludwig adopted the Supplemental Report and Recommendation and dismissed Petitioner's habeas petition as time barred. (R.R. 50). The instant appeal timely follows.

Factual Summary

The incident in question occurred in the evening of December 8, 1986. The Commonwealth's key witness, Harrington Fassett testified that he was at the Elbow Bend bar in West Philadelphia talking to Barry Smith. He testified that he observed Smith speaking with two (2) unidentified men. (N.T. 5/11/88 pp 24-25).

Fassett testified that shortly thereafter, Petitioner and two friends, Curtis Manning and Gerald James, arrived at the bar and began talking to Smith. The men walked to the back of the bar and continued to talk while James made a telephone call. Manning, James

and the Petitioner then walked outside. Smith left the Bar a few moments later (N.T. 5/11/88 pp. 27).

According to Fassett a gunshot was then heard, and Fassett went outside to find Smith slumped down on the ground bleeding (N.T. 5/11/88, 24-28). He did not see anyone outside except Smith who had been shot. (N.T. 5/11/88, pp 28). Fassett specifically testified that when he went outside he ***did not*** see Manning, James or Petitioner out there. (N.T. 5/11/88, pp 28). The Commonwealth presented no witnesses at trial who actually saw Smith being shot and killed.

Commonwealth witness, Annette Lloyd testified that Petitioner and his co-defendants went to her house after leaving the Bar, where they proceeded to divide up some money. (N.T. 5/13/88, pp.26-27). Lloyd also testified that Petitioner and his co-defendants discussed whether Smith had died. (N.T. 5/13/88, pp. 26-27). Commonwealth witnesses further testified that a search warrant of co-defendant's girlfriend, Tasha Clark's house was subsequently executed by police and a revolver was found. (N.T. 5/19/88, pp.56, 67).

Smith died of a single gunshot wound of the left temple area fired at close range. A .38 caliber projectile which was broken into two (2) pieces was recovered from the deceased (N.T. 5/23/88, 24-25). The recovered projectiles did not match the revolver found at Clark's house. (N.T. 5/19/88, pp. 56, 67; 5/23/88 pp. 32-33, 37).

Petitioner's defense was that the two (2) unidentified men who had spoken with Smith in the

Bar, (rather than he, James, and Manning), committed the shooting. This defense was supported by numerous credible witnesses.

At trial, Diana Sapp testified that she saw both Manning and James inside the bar with a third person (Petitioner) at the time the gunshot went off outside (N.T. 5/25/88, pg. 40-43). Darrell Malone testified that he was driving up to the bar when he saw (2) men grab Smith and then heard a shot. He recognized one (1) of the assailants as a person named "Kevin" (N.T. 5/24/88, p. 4-10). Malone testified that none of the assailants were the Petitioner or his co-defendants. (N.T. 5/24/88, p. 3). Ralph Cathell testified that he recognized the (2) men talking to Smith as "Rob" and "Tuck" (N.T. 5/26/88, pg. 4-5). When Cathell went outside after hearing the gunshot, he observed Rob and Tuck going through Smith's pockets (N.T. 5/26/88, pg. 6-7).

Statement of Questions Presented [5]

I. Did the District Court err by denying Petitioner a hearing on his claim of actual innocence?

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[5] Petitioner did not raise herein any claims based upon the District Court's requirement that Petitioner establish that he acted with due diligence. Petitioner relies upon the District Court's assertion that it denied the petition on separate grounds and a due diligence analysis is therefore unnecessary. (R.R. 49 n.6). Should this court however, determine that Petitioner has established 'actual innocence', Petitioner would renew his argument that there is no due diligence requirement or alternatively, that he acted with the due diligence under the circumstances.

II. Did the District Court err by making erroneous findings of fact pertaining to Petitioner's evidence of innocence that was contrary to the evidence?

The issues raised herein establish reviewable and meritorious claims of actual innocence. Failure to grant this application would be a miscarriage of justice.

Petitioner incorporates by reference herein his Memorandum of Law, which sets forth a summary only of the arguments which he intends on presenting more fully upon this Court's granting of the Certificate of Appealability and the filing of his brief in support thereof.

Respectfully Submitted,

/s/ TERI B. HIMEBAUGH
Teri B. Himebaugh, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY JOHNSON	:	
	:	
Petitioner	:	U.S.D.C. No. 02-1469
	:	No.
v.	:	
	:	
JOHN McCULLAH, et. al.	:	
	:	
Respondent	:	

EXHIBITS TO APPENDIX

	R.R.
U.S.D.C. Order dated 7/22/03	1
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Report and Recommendation 7/19/02	15-23
U.S.D.C. Order dated 8/14/02	24-25
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Affidavit of John Carvalho	29-30
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[R.R. 2-14]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FORM FOR USE IN APPLICATIONS FOR
HABEAS CORPUS UNDER 28 USC §2254
(eff. 8/1/01)

ANTHONY JOHNSON PETITIONER
(Full Name) (Include name under which you were convicted)

vs. CASE NO. 02-1469
(supplied by the Court)

JOHN MCCULLAH RESPONDENT
(Name of Warden, Superintendent, Jailor or authorized person having custody of petitioner)
and

THE DISTRICT ATTORNEY OF THE
COUNTY OF PHILADELPHIA
and

THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA
ADDITIONAL RESPONDENT

ANTHONY JOHNSON AS3197
Name Prison Number

P. O. BOX 1000 HOUTZDALE, PA 16698
Place of Confinement

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

INSTRUCTIONS - READ CAREFULLY

1. YOU MUST INCLUDE ALL POTENTIAL CLAIMS AND SUPPORTING FACTS FOR WHICH YOU MIGHT DESIRE TO SEEK REVIEW BECAUSE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION CANNOT BE FILED EXCEPT UNDER VERY SPECIFIC AND RARE CIRCUMSTANCES REQUIRING CERTIFICATION BY THE THIRD CIRCUIT COURT OF APPEALS AS SET FORTH IN INSTRUCTION # 13.

2. YOUR HABEAS CORPUS PETITION MUST BE FILED WITHIN THE 1-YEAR STATUTE OF LIMITATIONS TIME LIMIT SET FORTH IN 28 U.S.C. § 2244(d)(1). IF YOU FILE A PETITION WITHIN THE 1-YEAR TIME LIMIT AND THEN WISH TO FILE A NEW ALL-INCLUSIVE HABEAS CORPUS PETITION RAISING ADDITIONAL CLAIMS, YOU CAN FILE A MOTION ASKING THE COURT FOR AN EXTENSION OF TIME OF 120 DAYS IF THE 1-YEAR TIME LIMIT HAS EXPIRED OR WILL EXPIRE

WITHIN 119 DAYS OF THE DATE YOUR PETITION WAS FILED.

3. Any false statement of a material fact in your petition, in a motion for leave to proceed in forma pauperis, or in any other motion you file in this case may serve as the basis for prosecution and conviction for perjury.

4. This petition must be typewritten, printed, or legibly handwritten and signed by you as the petitioner on Page 12. You should answer all questions concisely in the proper space of the petition. If you need more room to answer any question, you may write on the reverse blank sides of the petition.

5. You may not attach additional pages to the petition. You do not have to list or cite the cases or law that you are relying on. If you do want to cite the cases and law you are relying on and make legal arguments, you should do so in a separate concise brief or memorandum which should be filed along with the petition.

6. When you file your petition, you must include a filing fee of $5.00. If you cannot pay the full filing fee, you must request permission to proceed in forma pauperis as explained in instruction #8.

7. Your petition will be filed if you have followed these instructions and it is in proper order. Petitions which are not in proper order will be returned to you with a notation as to what is improper.

8. To request permission to proceed in forma pauperis without paying the full filing fee, you must completely fill out pages thirteen through twenty of the petition. You should answer all questions and sign where indicated on Pages 13 and 19. You should see to it that an authorized prison official completes the certification on Page 20. You must prove that you cannot pay the full filing fee and other costs because of poverty and a discharge in bankruptcy will not excuse you from this requirement. The Court will let you know if you may proceed in forma pauperis.

9. Only final judgments entered by one state court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

10. As required by 28 U.S.C. § 2254(b)(1), you must have exhausted all claims that you are making in your petition. This means that every claim must have been presented to each level of the state courts. If you file a petition that contains claims that are not exhausted, the federal court will dismiss your petition and send it back to you so that you can exhaust all your claims and file your petition again. 28 U.S.C. § 2254(b)(2) provides that if it is perfectly clear that no colorable claims are presented, the federal court can also deny your petition on the merits.

11. As required by 28 U.S.C. § 2254(e)(1), a federal court, when considering your habeas corpus petition, must deem as correct a determination of fact made by a state court unless you rebut the

presumption of correctness by clear and convincing evidence. Under 28 U.S.C. § 2254(e)(2), if you have failed to develop the factual basis of a claim in state court proceedings, a federal court cannot hold an evidentiary hearing on that claim unless you show that:

(i) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable, or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence.

You must also show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found you guilty of the offense in question.

12. As required by 28 U.S.C. § 2244(b)(1), a federal court must dismiss any claim in a second or successive habeas corpus petition that was presented in a prior habeas corpus petition.

13. As required by 28 U.S.C. § 2244(b)(2), a federal court must dismiss any claim in a second or successive habeas corpus petition that was not presented in a prior habeas corpus petition unless you show:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on

collateral review by the U.S. Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found you guilty of the offense in question.

Before such a second or successive petition may be filed in the district court, however, the petitioner must move the court of appeals for an Order authorizing the district court to consider the petition. Petitioner's motion for such an Order must be determined by a three judge panel of the court of appeals, which must grant or deny the motion within 30 days. The court of appeals may grant the motion only if it determines that the petition makes a prima facie showing that it satisfies either (A) or (B) above.

14. 28 U.S.C. § 2254(i) provides that ineffectiveness of counsel during post-conviction, habeas corpus and P.C.R.A. proceedings in state or federal court may not be grounds for relief in your petition.

15. When the petition is fully completed, the **original and four copies** must be mailed to the **Clerk of the United States District Court, Room 2609, 601 Market Street, Philadelphia, PA 19106**.

PETITION

1. (a) Name and location of court which entered the judgment of conviction under attack:
   Philadelphia
   (b) Name of Prosecutor: Randolph Williams
   (c) Prosecution conducted by District Attorney's Office of Philadelphia County

2. (a) Date of Judgment of conviction: 6/3/88
   (b) Indictment number or numbers: March Term 1987 Nos 1681-1685
   Term:_____ Criminal Case Number:_____

3. Length of sentence: Life Sentencing Judge: Biunne

4. Nature of offense or offenses for which you were convicted:
   Second Degree Murder, criminal conspiracy

5. What was your plea? (check one)
   (a) Not Guilty (x) (b) Guilty ( )
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:_____

6. Kind of trial: (check one)
   (a) Jury (xx) (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (x)

8. Did you appeal from the judgment of conviction?
Yes (x) No ( )

9. If you did appeal, answer the following:
(a) Name of court: Superior Ct., PA Supreme Ct.
(b) Result: Denied
(c) Date of Result: 9/13/90, 4/26/91

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details:

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:
(a) (1) Name of Court: C.C.P. PCRA 2/20/92
(2) Nature of proceeding: Post Conviction Petition
(3) Grounds raised: ineff. assistance / trial error, failure to challenge Det. Troutner's testimony; references to police photos; improper admission of photos of co-defendant with a gun; prosecutorial statements inferring guilt by association prejudicial prosecutorial stmts. appellate ineffectiveness for failing to preserve issues.
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No (x)

(5) Result:_____

_____

(6) Date of result:_____

(b) As to any second petition, application or motion give the same information:

(1) Name of Court: C.C.P 1/10/97

(2) Nature of proceeding: Post Conviction

_____

(3) Grounds raised: Defective jury instruction on maliced; ineffectiveness and trial error; failing to call witnesses; failure to cross examine Clark/Fassett; failing to move for suppression; failing to object to improper impeachment of Cathell

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (x)

(5) Result: Denied

_____

(6) Date of result: 7/16/97

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court: C.C.P 1/28/99

(2) Nature of proceeding: Post Conviction

_____

(3) Grounds raised: same as those raised previously

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (x)

(5) Result: Denied

(6) Date of result: 7/16/97

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes (x) No ( )
(2) Second petition, etc. Yes (x) No ( )
(3) Third petition, etc. Yes (x) No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all you state court

remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(I) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Petitioner was denied his 6th and 14th A. rights pertaining to a defective jury instruction on the element of malice.

Supporting FACTS (tell your story briefly without citing cases or law):

The Court's instruction established a mandatory conclusive presumption, relieving the Commonwealth of its' burden of proof.

B. Ground two: Petitioner was denied his 6th and 14th A. rights when the prosecution was permitted to improperly impeach Cathell, a critical defense witness, with 'open arrests'.

Supporting FACTS (tell your story briefly without citing cases or law:

The Commonwealth was permitted to impeach a critical defense witness with evidence of 'open arrests'; counsel failed to object and stipulateed to some of the offensive impeachment evidnece

C. Ground three: Petitioner was denied his 14th A. right in that the trial court improperly admitted speculative testimony from Det. Troutner that was not based on evidenve of record.
Supporting FACTS (tell your story briefly without citing cases or law:
Testimony was elicited from Det. Troutner that inferred that Petitioner would have fled prior to his arrest. Said testimony was opinion and not based on any evidecne.

D. Ground four: Petitioner was denied his 14th A. right due to prejudicial references by police witnesses to photos in their possession, inferring prior criminal activity.
Supporting FACTS (tell your story briefly without citing cases or law:
The Commonwealth offered testimony which contained numerous references to having various photos of the Petitioner which it was inferred were taken while he was in custody on prior occassions. This directly inferred prior criminal activity on the part of the Petitioner.

Ground Five: Petitioner was denied his 6th and 14th A. right when a photograph of co-defendant James that depicted him and another in possession of a weapon was admitted at trial.

The Commonwealth sustained part of its burden of proof by admitting evidence that Petitioner is guilty due to his association with other individuals who

appear to have been involved in other, non related criminaL activity.

Ground Six: Petitioner was denied his 14th and 6th A. rights related to admission of guilt by association testimony pertaining to defense witness Cathell having been shot by Mark Drake, a friend of the Petitioner.

The Commonwealth sustained part of its burden of proof by establishing Petitioner guilty by association to Drake.

Ground Seven: Petitioner was denied his 6th and 14th A. rights when the prosecution was permitted to make irrelevant, improper and prejudicial comments in its' closing.

The prosecution made reference to Petitioner's incarceration. The prosecution also vouched for the credibility and accuracy of the police conclusion that the Petitioner and his co-defendants committed the crime.

Ground Eight: Petitioner was denied his 6th A. right when counsel failed to properly investigate and present key exculpatory witnesses.

Defensw counsel was aware of the relevance of the testimony of several key witnesses, but he failed to either ensure that they were present at trial to give testimony or were called as witnesses. These witnessess include Carvahlo, Freeman, Key, Bey.

Ground Nine: Petitioner was denied his 6th A right when counsel failed to cross-examine Clark about her testimony being coerced by authorities

Clark initially gave a statement to police which she later recanted. Clark asserted that she was coerced and threatened into giving the initial statements. Counsel failed to cross examine her about this.

Ground Ten: Petitioner was denied his 14th A. right in that trial court improperly admitted prior inconsistent statements of three witnesses as substantive evidence.

The statements in question related to Lloyd, Lee and Clark. Each of these statements were admitted despite their not having sufficient indicia of reliability.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:_____

_____

(b) At arraignment and plea:_____

(c) At trial: Joseph Canuso, Esq.

(d) At sentencing: Joseph Canuso, Esq.

(e) On appeal: Mary Zell, Esq.

(f) In any post-conviction proceeding:_____

Mitchell Strutin, Esq.

(g) On appeal from any adverse ruling in a post-conviction proceeding:_____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes (x) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ( ) No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future:_____

_____

(b) And give date and length of sentence to be served in future:_____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No ( )

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4/15/02 /s/ Anthony Johnson
Signature of Petitioner

/s/ Teri B. Himebaugh
Signature of Attorney (if any)

[R.R. 26-28]

I Tasha Clarke Due swear to everything I write in this affidavit. No one has inticed me into telling this truth. I take this upon myself to admit the real truth. Starting back in Dec. 19, 1986. When I was interviewed at the Homicide Division, I was threaten by Detective Piree and another Detective who's name I can't recall that if I wanted to go home and not to jail I had to sign a statement that I didn't get to read after the interview. So since I was so intimidated by the threat of being locked up I signed the paper willingly and I was released. Then 3 weeks before the trail of Gerald James, Anthony Johnson and Curtis Manning, I received a Subpoena to come to the D.A.'s office but I didn't go. A week later Detectives Piree, Troutner came to my house along with Police in Police van and cars and locked me up and took me to the D.A.'s office. Where Rudolph Williams the D.A. and Detective Piree, Troutner spoke with me and Piree said if don't agree to everything in the statement they had me sign that Charges would be filled against me. So Mr. Williams said just follow his directions and every thing would be alright. So Mr. Williams went over the statement with me and told me to agree to the statement when I come to court and he told me if anyone asked me did I talk to him or the Detectives about the case before trail say no. So when the trail began I was asked by Piree in the Hall of City Hall did I remember everything I was told to say I said yeah. Then the day I was supose to take the stand I was scared so I didn't show up so Det. Piree called my house and told me that the judge was going to give me two hours to come or they would come and lock me up and I would be on trail for

murder so when I appeared that day the D.A. told me if I didn't agree to the statement I would be locked up for conspiracy to Murder. Then they bought Angie Lee out of the court room in handcuffs. The Det. Piree said, She didn't do what I've told her to do so she was going to jail and if I didn't do what I was told I was next so I told him ok. The D.A. and the Detectives just kept threating me to lie. So when I testifyied I agreed to everything on the statement. During the time I testifyied I was intoxicated off of codeine because my nerves were bad. I was so confused & scared I didn't want to go to jail. I hope it's not to late to tell the truth of what happen. Because they shouldn't get life for something they didn't do and I pray I'm doing the right thing. I have made this affidavit on my own will and I swear to God everything in it is the truth this time.

Ms. Tasha A. Clarke

NOTARIAL SEAL
TYRONE THOMAS, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Oct. 5, 1990

Sworn and subscribed before me
this 4 day of Dec 1988

[R.R. 29-30]

AFFIDAVIT

I, John Carvalho. Being duly sworn, Hereby Depose and say that I am being asked about the shooting death of Barry Smith on December 8, 1986, Philadelphia, Pennsylvania. I really don't recall the actual date, but I do recall Barry being shot to death outside the Elbow Ben Bar at Conestogaa & Master Streets. I was in Elbow Bend that night, even though I told the Police I was not there. I did not want to get involved in this thing. Anyway, there was only one way in the bar and one way out. I had seen Barry in the bar. I knew him for about a year, he sold drugs in the neighborhood. I am being asked about Curtis Manning, Anthony Johnson, and Gerald James, who were charged with this crime. I know Curtis, Anthony and Gerald from the neighborhood. We were not really friends, I went to school with Curtis's sister. Anyway, that night, Curtis, Anthony and Gerald were in the bar too. Barry came over and shook my hand, he was leaving. I didn't notice if anybody left with him. But Curtis, Anthony and Gerald were still in the bar. I heard a shot outside the bar and me and people started outside. In fact, I remember bumping into Curtis on the way out the door. When I got outside, I saw 2 guys going through Barry's pockets. Barry was on the ground. I saw another guy standing across the street, Anthony and Gerald were sitting in a car across the street. They guy standing across the street was a short guy, about 20-25, 5'5, -5'6. I walked out in the street, and took a look at the 2 guys going through Barry's pockets. They were both dark skinned, in their early

20's. Their backs were towards me, but I could see some of their face. I decided I was getting out of there. Barry looked to be dead. About a week or 2 later, I heard that Curtis, Anthony and Gerald had gotten arrested for this. I said to myself, they didn't do that shit. I didn't tell anybody that they didn't do it. In fact, when the cops interviewed me, I told them I wasn't there. Curtis, Anthony and Gerald knew I was in the bar that night, and knew they didn't do anything, except to be there. Their people subpoenaed me several times, but I never did testify. Once when I did show up at the Court, they made me sit next to a cop, who kept acting like I was his prisoner, I did not testify. As I have already said, Curtis Manning, who is about 6'5, and fair skinned, Anthony, who is also light skinned, 5'10, Gerald, who is brown skinned and 5'9, had nothing to do with the killing or robbery of Barry Smith. The 2 or 3 guys who did this were all short and dark skinned and in their 20's.

There were alot of people in the bar that night when Barry got shot, but as will happen in the neighborhood, nobody wants to admit they saw anything. Nobody wants to get involved. I know that Curtis Manning, Anthony Johnson, Gerald James had nothing to do with the death of Barry Smith, and I did show up in Court, where I was willing to testify as to what really happened that night, but both times, the court officer and cop told me to go home, that I wasn't needed.

/s/ John Carvalho
AFFIANT - JOHN CARVALHO

Sworn and Subscribed

Before me this 20th day
of Dec., 1996

/s/ Josephine Johnson
NOTARY PUBLIC

NOTARIAL SEAL
JOSEPHINE JOHNSON, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Feb. 24. 1997

[R.R. 31]

STATEMENT OF: Andre Key

I am being asked about the shooting death of Barry Smith on December 8th, 1986, outside the Elbow Bend Bar at Conestoga & Master Sts. in Phila. I don't remember the date, but back then I sold drugs for a guy named Stephan (I don't know his last name), nicknamed "Sport". On that night, I was with Khadir (Kevin Taylor) and we gave money to Stephan to get some drugs. The 3 of us went with a guy I only know as "Smoke" in a car, to the Elbow Bend Bar. Smoke stayed in the car. Me, Khadir and Stephan went into the bar. We all knew Barry Smith, he dealt drugs. I was chit-chatting with a few people at the bar. I don't remember who, now. Khadir and Stephan went to the pinball machine where Barry was playing. All 4 of us then left the bar. We are all walking toward the car, Smoke is now out of the car. Stephan and Barry are in front of me and Khadir, and they are arguing. Stephan is trying to go into Barry's pockets. Barry pushed Stephan, who pulls a gun from the waist of his pants and just shoots Barry in the head. I saw Stephan pull the gun and fire it. Me and Khadir turned and ran, we never looked back. I don't know what happened after that. Me and Khadir had no idea that Stephan was going to shoot anybody, we was just going to get some drugs from Barry. In 1988 I took an arrest for drugs. I tried to tell the cops I could tell them who killed Barry Smith, to make a deal. They told me they already had the right guys for that job.

/s/ Andre Key
AFFIANT - ANDRE KEY AKA [illegible]

Sworn and Subscribed
Before me this 26 day
of Feb., 1997

/s/ [illegible]
NOTARY PUBLIC

NOTARIAL SEAL
[illegible]

[R.R. 32-33]

AFFIDAVIT

I, Karen Mathis, being Duly Sworn, Hereby Deposes and says that I am being asked out the shooting death of Barry Smith outside the Elbow Bend Bar at Conestoga & Master. I recall that night, I had only been working at the bar, I was a barmaid, for a week, prior to the shooting. I knew Barry Smith as coming in the bar. That night, he was playing the pinball machine when 2 or 3 guys came in and walked up to him. I would say these guys were Barry's height, 5'9", or so. Nobody was 6' tall. One guy got on each side of Barry, and they were talking to him. I think there had been a third person, but I don't know for sure if he came in with the other 2. I remember the 2 guys walked out with Barry. It was busy, aboaut 20 people in the bar. There was a party going on. We had a D.J. and the side door was locked, there was only one way in and one way out. Anyway, after Barry and the 2 guys left, I heard a pop. I had never heard a gunshot before and I was busy, so I didn't really pay any attention. A guy who I now know is Dave Johnson came in and said that Barry got shot. I went outside and saw Barry laying on the ground. I noticed that his pants pockets were turned inside out. When I went back inside the bar, I just sat there, stunned. The police came in and I closed the bar. I went home and later the police took me down to Homicide to tell them what had happened. I am being asked about a guy named Curtis Manning. I do not know this person. I am being told he is about 6'5" and 250 lbs. The guys with Barry Smith were Barry's size, no one was even 6' tall, let

along 6'5". If the guys who left with Barry were 6'5", I certainly have noticed that. I never saw the guys who went outside with Barry before that night, and I never saw them since that night. When I got outside, those guys were gone. No one ever spoke with me about appearing in Court with regard to this case. I don't know Curtis Manning, but if he is 6'5", I can swear he was not one of the guys at the pinball machine with Barry and he was not one of the guys who went outside with Barry, just before he got shot.

/s/ Karen Mathis
AFFIANT - Karen Mathis

Sworn and Subscribed
Before me this 22 day
of November, 1996

/s/ Ronda S. Page
NOTARY PUBLIC

NOTARIAL SEAL
RONDA S. PAGE, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Jan. 10, 1999

[R.R. 34]

AFFIDAVIT

I, Mark Freeman, being Duly Sworn, hereby Deposes and Says that I am being asked about the shooting death of Barry Smith on 12-8-86, outside the Elbow Bend Bar in Philadelphia. At that time, I knew Barry Smith. The bar is at Conestoga & Master Sts. and I was walking along Master St., from 52nd St. When I got across the street from the bar, I saw a guy named Stephan McKellop (sic?). He had Barry in the collar, with a gun to Barry's head. Another guy, who I don't know, was going through Barry's pockets. The gun went off and Barry went down. The other guy kept going through Barry's pockets, like nothing had happened. Stephan and the other guy jumped into a car that pulled off. I didn't see who was driving the car. I saw Ya Ya come out of the bar and go back in. I saw a girl named Diane come out of the bar and go away. I know Curtis Manning, Gerald James and Anthony Johnson. I didn't see any of them on the corner while I was there. I left when the police came. I never came forward because I didn't want to get involved. Actually, no one ever asked me about what I knew, until now. Stephan and the other guy were both about Barry's size, and dark skinned. Stephan had the gun in his hand when it went off, killing Barry Smith.

/s/ Mark Freeman
AFFIANT - Mark Freeman

Sworn and Subscribed
Before me this 19 day
of June, 1996

/s/ Rita C. Shape
NOTARY PUBLIC

NOTARIAL SEAL
RITA C. SHAPE, Notary Public
Smithfield Twp., Huntingdon County, Pa.
My Commission Expires [illegible]

[R.R. 35]

STATEMENT OF: Abdel Bey

I am being asked about the shooting death of Barry Smith outside the Elbow Bend Bar at Conestoga & Master. I am told the date was December 8th, 1986. If that's a Monday, it could be correct. I was a D.J. and a bartender at the Elbow Bend. I remember that night, Monday Night Football was on TV. I am supplied with a copy of the statement I gave to the police, dated 12-9-86. As you can see in my statement, 2 or 3 guys were with Barry. I didn't see them leave, but obviously they left the bar together. As I state on page 3, the big guy was 5'9"/5'10", and built real big. He took up a lot of room. I am being asked about Curtis Manning, Anthony Johnson, and Gerald James. I honestly don't recall seeing these 3 guys from the bar. I am told that Curtis Manning is about 6'5", 250 lbs., and light skinned. If he was in the bar that night, he is certainly not one of the guys who was with Barry. Like I said, the big guy was maybe 5'10", and dark complexion. I couldn't identify the other guy or 2, anyway. I once went to Court on this case. I don't even know who got locked up for killing Barry. A black A.D.A. talked with me. I told him what I am saying now, and that my statement was correct, I could not identify the other 2 guys, and maybe I could ID the big guy, you can see my description of him. I was told to leave and never contacted again about this case, until now. I would have been willing to appear in Court, if anyone had asked me to.

/s/ Abdel Bey
AFFIANT - ABDEL BEY

Sworn and Subscribed
Before me this 31st day
of March, 1997

/s/ [illegible]
NOTARY PUBLIC